

Applicant Details

First Name **Aaron**
 Middle Initial **J**
 Last Name **Horner**
 Citizenship Status **U. S. Citizen**
 Email Address aaron.jackson.horner@gmail.com

Address

Address
Street
7225 9th Avenue, Apt. 1310
City
Port Arthur
State/Territory
Texas
Zip
77642
Country
United States

Contact Phone Number **(336)469-7062**

Applicant Education

BA/BS From **Gardner-Webb University**
 Date of BA/BS **May 2017**
 JD/LLB From **Baylor University School of Law**
<http://www.baylor.edu/law/>
 Date of JD/LLB **May 2, 2020**
 Class Rank **5%**
 Law Review/Journal **Yes**
 Journal(s) **Baylor Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **2019 TYLA State Moot Court Competition**
Jeffrey G. Miller National Environmental Law Moot Court Competition

Bar Admission

Admission(s) **North Carolina**

Prior Judicial Experience

Judicial Internships/
Externships **Yes**
Post-graduate
Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Miller, Elizabeth
elizabeth_miller@baylor.edu
254-710-6583

Wren, Jim
James_Wren@baylor.edu
2547107670

Mahlberg, Natalie
natalie_mahlberg@txed.uscourts.gov

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

Aaron J. Horner

7225 9th Avenue, Apt. 1310 | Port Arthur | Texas 77642 | 336.469.7062 | aaron.jackson.horner@gmail.com

Monday, March 7, 2022

The Honorable John D. Bates
United States District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Judge Bates:

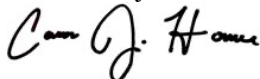
I am writing to apply for a position as a law clerk in your chambers beginning in the fall of 2022. I am currently serving in the chambers of the Honorable Marcia A. Crone, United States District Judge for the Eastern District of Texas, and am eager to continue clerking.

Stemming from my undergraduate education that focused, in part, on analytics, I developed a passion for procedural issues in law school. During my time at Baylor School of Law, I took numerous classes focused on federal procedural law and earned the “High A” or highest grade in three of those classes, including Civil Procedure, Practice Court I: Pretrial Practice & Procedure, and Practice Court III: Post-trial Practice, Procedure, & Evidence. My interest in federal procedural law has increased during my time as a law clerk in which I use the Federal Bankruptcy, Civil, Criminal, and Evidence Rules on a regular basis. Indeed, I am affectionately known by my colleagues and Judge Crone as “Mr. Evidence.” I am fascinated by the opportunity to further enhance my understanding of federal procedural rules, which I hope to use in either a career with the federal courts or in academia.

Throughout my time in law school and in the workforce, I have had the opportunity to perfect my research and writing skills. While at Baylor Law School, I won numerous writing awards, including Baylor’s Ultimate Writer Competition and the Jerry L. Beane Award for Writing. I also served on the editorial board of the *Baylor Law Review* as the Managing Executive Editor, during which time I managed student writing, reviewed and edited many student articles, and directed a team of editors. My time interning and clerking for various state and federal courts has made my research and writing more efficient and concise. These research and writing skills are supported by my experience in analytics, both during my undergraduate education and while researching for Professor Jim Wren on the issue of data analytics in litigation. I am confident that I can apply these skills while serving as a law clerk.

I am enthusiastic about this judicial clerkship position and would love the opportunity to discuss the possibility of joining you in 2022. Judge Crone welcomes you to call her at (409) 654-2880 to discuss my work performance. I have attached my resume describing my qualifications, as well as a law school transcript and a writing sample. I can be reached at (336) 469-7062 or aaron.jackson.horner@gmail.com. Thank you for your consideration.

Yours truly,



Aaron J. Horner

Aaron J. Horner

7225 9th Avenue, Apt. 1310 | Port Arthur | Texas 77642
336.469.7062 | aaron.jackson.horner@gmail.com

EDUCATION

Baylor University School of Law, Waco, TX

May 2020

Juris Doctor, *summa cum laude*

Class Rank: 1 of 123; Business Planning Special Distinction; Special Distinction in Litigation

- High A: Civil Procedure; Criminal Law; Property II; LARC 3: Persuasive Communications, Section 4; Business Organizations I; Securities Regulation; Taxation of Business Entities; Practice Court I: Pretrial Practice & Procedure; Practice Court III: Post-trial Practice, Procedure, & Evidence; Client Counseling
- *Baylor Law Review*, Editorial Board – Managing Executive Editor
- Author of *How Difficult Is It to Challenge Lines on a Map?: Understanding the Boundaries of Good Faith in Abbott v. Perez*, 72 Baylor L. Rev. 370 (2020)
- Research Assistant, Professor Elizabeth Miller, M. Stephen and Alyce A. Beard Chair in Business and Transactional Law, and Professor James Wren, Leon Jaworski Chair of Practice & Procedure
- Baylor Interscholastic Moot Court Team – Jeffrey G. Miller National Environmental Law Moot Court Competition, Semi-finalist; TYLA State Moot Court Competition 2019, First Place
- Baylor Interscholastic Mock Trial Team – Stetson National Pretrial Competition; American Association for Justice Student Trial Advocacy Competition (Evidence Coach) (competition canceled due to the COVID-19 pandemic)
- Baylor Interscholastic Transactional Law Team – 2020 LawMeets Transactional Competition, Best Drafting (Seller)
- Baylor's Ultimate Writer Competition 2018, First Place
- The President's Award; Jim Barlow Memorial Award (Criminal Law); William R. Trail Civil Procedure Award; M.D. Anderson Best Brief Award; Haley & Olson, P.C. Corporate Law Award; Jerry L. Beane Award (Writing)

Gardner-Webb University, Boiling Springs, NC

May 2017

Bachelor of Science in Business Administration & Political Science, *magna cum laude*

Minor in Mathematics

- Honors Thesis: "A Feuding House: An Examination of the Causes and Effects of the Decline of Bipartisanship in the United States Congress."
- Alpha Chi Interdisciplinary, Delta Mu Delta Business, and Pi Sigma Alpha Political Science Honor Societies

PROFESSIONAL EXPERIENCE

District Judge Marcia Crone

United States District Court for the Eastern District of Texas

Aug. 2020 – Present

Law Clerk

- I managed four civil jury trials and a complex, multi-defendant criminal trial.
- I am responsible for all bankruptcy appeals before Judge Crone, as well as a portion of Judge Crone's civil and criminal dockets.
- I drafted multiple orders on issues including Title VII discrimination and retaliation, the Fair Labor Standards Act, the Truth in Lending Act, Texas's Fair Debt Collection Practices Act, Texas's Deceptive Trade Practices Act, Texas's Theft Liability Act, attorneys' fees, and federal preemption.

Magnolia Market, LLC, Waco, TX

Feb. 2020 – Apr. 2020

In-House Counsel Extern

Judge Valerie Zachary of the North Carolina Court of Appeals

July 2019 – Aug. 2019

Judicial Intern

Window World, Inc., North Wilkesboro, NC

July 2019

In-House Counsel Intern

Crumpler Freedman Parker & Witt, Winston-Salem, NC

May 2019 – June 2019

Summer Law Clerk

Fulkerson Lotz LLP, Houston, TX

Apr. 2019 – May 2019

Summer Law Clerk

Magistrate Judge Jeffrey C. Manske

United States District Court for the Western District of Texas

Nov. 2018 – Jan. 2019

Judicial Extern

Grace, Tisdale & Clifton, P.A., Winston-Salem, NC

May 2018 – July 2018

Summer Law Clerk

Jan. 2019 – Apr. 2019

ADMISSIONS TO PRACTICE

State of North Carolina | State of Texas | United States District Court for the Eastern District of Texas

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Page: 1

Record of: Horner, Aaron J.

Date Issued: 01-JUN-2021

Issued To: Aaron Horner

Date of Birth: 10-FEB

Parchment: 34536050

SSN: ***-**-5209

Official PDF Transcript

Level: Law

Course Level: Law

SUBJ NO. COURSE TITLE CRED GRD RPT

Current Program

Degree : Juris Doctor

College : Law School

Major : Law

Comments:

BONUS POINTS EARNED: MOOT COURT - 8

FINAL GPA: 3.901; CLASS RANK: 1/123

Degree Awarded : Juris Doctor 02-MAY-2020

Major : Law

Inst. Honors: Summa Cum Laude

Institution Information continued:

Law School

LAW	COURSE TITLE	CRED	GRD	RPT
9203	LARC 3: Persuasive Comm	2.00	A	
9207	Basic Taxation Princ for Lawy	2.00	A	
9312	Property 2	3.00	A	
9315	Legislation, Admin Pwr & Proc	3.00	B+	
9356	Criminal Procedure	3.00	B+	

	AHRS	EHR	GPAHRS	GPA
Current:	13.00	13.00	13.00	3.69
Cumulative:	41.00	41.00	41.00	3.68

Dean's List

SUBJ NO. COURSE TITLE CRED GRD RPT

INSTITUTION CREDIT:

Fall 2017

High A in Civil Procedure

Law School

LAW	COURSE TITLE	CRED	GRD	RPT
9101	LARC 1: Introduction	1.00	A	
9405	Civil Procedure	4.00	A	
9407	Contracts 1	4.00	A-	
9413	Torts 1	4.00	B+	

	AHRS	EHR	GPAHRS	GPA
Current:	13.00	13.00	13.00	3.69
Cumulative:	13.00	13.00	13.00	3.69

Dean's List

Winter 2017

High A in Criminal Law

Law School

LAW	COURSE TITLE	CRED	GRD	RPT
9103	LARC 2: Introduction	1.00	A	
9303	Criminal Law	3.00	A	
9314	Torts 2	3.00	A-	
9408	Contracts 2	4.00	B+	
9411	Property 1	4.00	A-	

	AHRS	EHR	GPAHRS	GPA
Current:	15.00	15.00	15.00	3.66
Cumulative:	28.00	28.00	28.00	3.67

Dean's List

Spring 2018

High A in Property 2

High A in LARC 3, Section 4

***** CONTINUED ON NEXT COLUMN *****

Fall 2018

High A in Business Organizations 1

Law School

LAW	COURSE TITLE	CRED	GRD	RPT
9105	LARC: Litigation Drafting	1.00	P	
9326	Remedies	3.00	A	
9504	Trusts & Estates	5.00	B+	
9521	Business Organizations 1	5.00	A	

	AHRS	EHR	GPAHRS	GPA
Current:	14.00	14.00	13.00	3.74
Cumulative:	55.00	55.00	54.00	3.69

Dean's List

Winter 2018

High A in Securities Regulation

Law School

LAW	COURSE TITLE	CRED	GRD	RPT
9104	LARC: Transactional Drafting	1.00	A	
9294	Federal Judicial Externship	2.00	P	
9322	Bus Organizations 2	3.00	A-	
9344	Securities Regulation	3.00	A	
9524	Constitutional Law	5.00	A	
9V10	Advocacy Team	2.00	A	

	AHRS	EHR	GPAHRS	GPA
Current:	16.00	16.00	14.00	3.92
Cumulative:	71.00	71.00	68.00	3.74

Dean's List

Spring 2019

High A in Taxation of Business Entities

Law School

LAW	COURSE TITLE	CRED	GRD	RPT
9292	Business Planning & Drafting	2.00	A-	

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AN OFFICIAL SIGNATURE IS BLACK WITH A YELLOW BACKGROUND

This officially sealed and signed transcript is printed on green security paper with the name of the university printed in small type across the face of the entire document. A raised seal is not required.



Jonathan C. Helm
Jonathan C. Helm, Registrar

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Page: 2

Record of: Horner, Aaron J.

Date Issued: 01-JUN-2021

Date of Birth: 10-FEB

SSN: ***-**-5209

Level: Law

SUBJ NO.	COURSE TITLE	CRED	GRD	RPT	SUBJ NO.	COURSE TITLE	CRED	GRD	RPT
Institution Information continued:					Institution Information continued:				
LAW 9323	Federal Courts	3.00	A		LAW 9V99	Independent Study	1.00	A	
LAW 9333	Advanced Legal Research	3.00	A-			AHRS EHRS GPAHRS GPA			
LAW 9342	Comm Law: Secured Trans	3.00	A		Current:	14.00 14.00 12.00	4.00		
LAW 9346	Taxation of Business Entities	3.00	A		Cumulative:	127.00 127.00 118.00	3.83		
	AHRS EHRS GPAHRS GPA				Dean's List				
	Current:	14.00	14.00	14.00	3.88				
	Cumulative:	85.00	85.00	82.00	3.76				
	Dean's List								
Fall 2019					***** TRANSCRIPT TOTALS *****				
High A in Practice Court 1						Attmpt Hrs Earned Hrs GPA Hrs GPA			
Law School					TOTAL INSTITUTION	127.00 127.00 118.00	3.83		
LAW 9229	Professional Responsibility	2.00	A-		TOTAL TRANSFER	0.00 0.00 0.00	0.00		
LAW 9520	Practice Court 2: Trial Evidenc	5.00	A		***** END OF TRANSCRIPT *****				
LAW 9527	Practice Court 1: Pretrial Pra	5.00	A						
LAW 9V10	Advocacy Team	2.00	A						
	AHRS EHRS GPAHRS GPA								
	Current:	14.00	14.00	14.00	3.95				
	Cumulative:	99.00	99.00	96.00	3.79				
	Dean's List								
Winter 2019									
High A in Practice Court 3									
Law School									
LAW 9345	Tax of Ind & Family Businesses	3.00	A						
LAW 9528	Practice Court 3: Trial & Po	5.00	A						
LAW 9V10	Advocacy Team	2.00	A						
LAW 9V91	Law Review	4.00	P						
	AHRS EHRS GPAHRS GPA								
	Current:	14.00	14.00	10.00	4.00				
	Cumulative:	113.00	113.00	106.00	3.81				
	Dean's List								
Spring 2020									
High A in Client Counseling									
Law School									
LAW 9227	Client Counseling	2.00	A						
LAW 9324	Complex Litigation	3.00	A						
LAW 9383	Conflict of Laws	3.00	A						
LAW 9V10	Advocacy Team	2.00	A						
LAW 9V93	In-House Counsel Externship	2.00	P						
LAW 9V99	Independent Study	1.00	A						
***** CONTINUED ON NEXT COLUMN *****									

AN OFFICIAL SIGNATURE IS BLACK WITH A YELLOW BACKGROUND

This officially sealed and signed transcript is printed on green security paper with the name of the university printed in small type across the face of the entire document. A raised seal is not required.



Jonathan C. Helm
Jonathan C. Helm, Registrar

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March 11, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am pleased to recommend Aaron ("A.J.") Horner for a judicial clerkship in your chambers. In my dealings with A.J., I found him to be personable, conscientious, hardworking, and exceptionally capable. Based on his performance at Baylor Law School and his subsequent experience as a term clerk for a federal district court, I believe he would be very well-suited to a clerkship with a focus on proposed amendments to the federal rules of practice and procedure.

As is evident from A.J.'s resume and transcript, A.J.'s academic performance at Baylor Law School was exceptional. I had A.J. as a student in my Business Organizations I, Business Organizations II, and Business Planning classes, and his performance was excellent in each of these classes. Because I was impressed by A.J.'s abilities, I asked him to provide me with research assistance on some special projects. A.J.'s work as my research assistant was also excellent. He was efficient and thorough and demonstrated strong writing skills. He was receptive to my comments, and I enjoyed working with him. I recommended him without reservation for his current judicial clerkship.

Baylor's rigorous and broad-based required curriculum, including its uniquely challenging third-year Practice Court program, provides a strong foundation for a judicial clerkship. In addition, A.J. pursued other opportunities while he was a student that furthered his preparation for a judicial clerkship. A.J. served on the editorial board of the Baylor Law Review, was a member of multiple Baylor Law interscholastic advocacy teams, participated in an intraschool legal writing competition (which he won), took an advanced legal research class, and served as an intern for a federal magistrate judge. Of course, the experience and perspective gained by A.J. in his current role as a term law clerk for Judge Crone will be extremely valuable in a subsequent judicial clerkship.

In sum, I believe A.J. is a superb candidate for a judicial clerkship in your chambers. If you have any questions, please do not hesitate to contact me.

Sincerely,

Elizabeth S. Miller
Professor of Law
M. Stephen and Alyce A. Beard Chair
in Business and Transactional Law

Elizabeth Miller - elizabeth_miller@baylor.edu - 254-710-6583

April 04, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I wholeheartedly recommend A.J. Horner to you for a judicial clerkship.

As one of A.J.'s Baylor Law School professors, I had the opportunity to work extensively with A.J. throughout his third year of law school. At Baylor Law, the sixth-month Practice Court program – required of all third-year students – is a totally consuming experience. The academics are demanding, the work is grueling, and the grading is rigorous. Daily classes focused on litigation procedure and evidence run from 7:45 a.m. until noon, trial advocacy exercises take place in the afternoons, and the nightly preparation for the next day typically requires 100 to 200 pages of case law. In short, we intentionally put students into a highly pressurized environment under severe time constraints. And in my Fall 2019 Practice Court class of 96 students, A.J. earned the High A. His work excelled. A.J. consistently demonstrated the highest level of maturity and resilience, with disciplined and thorough preparation for each day of class and trial exercises.

Following A.J.'s completion of the Practice Court program, based on my observations of his work, I recruited A.J. to serve as my research assistant through the remainder of his time in law school. Again, A.J.'s research and written work was exemplary.

Just as importantly in my view, A.J. is a person of integrity. His word is his bond. He takes personal responsibility for his work, and he works well with others. In short, A.J. has earned my complete confidence and trust. He is going to continue to advance as an outstanding attorney and leader. He is someone I would want on my team, and he would benefit immensely from the opportunity to work with and learn from you.

You are welcome to email me (James_Wren@baylor.edu) or call me (254-710-7670) for additional details. A.J. has earned my highest recommendation.

Sincerely,

James E. Wren
Leon Jaworski Chair of Practice & Procedure

Jim Wren - James_Wren@baylor.edu - 2547107670

March 3, 2022

The Honorable John D. Bates
United States District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Bates,

I have had the pleasure to get to know Aaron “AJ” Horner while he has been clerking with Judge Crone over the last year and a half. He was my top pick of law clerk applicants from his class, and despite my high hopes, he has exceeded my expectations. AJ is a talented writer and very efficient drafter. He researches and drafts on novel issues before the court with little to zero supervision. He is also a very diligent worker; he comes in early and works on the weekends when needed. He sets the bar high for all of us in chambers.

AJ has worked on a variety of issues and has even been tasked to help several other law clerks with complicated cases and trials. In addition to a busy pretrial civil docket, he has managed complex criminal trials, civil trials, bankruptcy appeals, and an uncountable number of criminal motions.

In addition to excelling in his work as a law clerk, AJ is also a wonderful personality to work with. He is always available to discuss cases and offer recommendations. He has a great sense of humor and has established a strong sense of comradery with all his coworkers. Furthermore, we can always count on AJ to do the right thing and operate with the utmost sense of responsibility to the court.

His academic accomplishments indicate that he can handle the most complicated legal assignments. His law school has prepared him well for litigation and we lovingly refer to him as Mr. Evidence due to his mastery of the Federal Rules of Evidence. As AJ’s resume demonstrates, he is ambitious, loyal, and motivated. His positive attitude made a welcome impact on all of us, and while we miss his presence in our chambers, we are excited to see his legal career excel.

I truly believe AJ will be a wonderful asset to your chambers. If you have any questions, I would be happy to discuss.

Sincerely,

Natalie Mahlberg
Career Law Clerk to the Honorable Marcia A. Crone
409-654-2884
Natalie_Mahlberg@txed.uscourts.gov

Writing Sample

This writing sample is a portion of an opinion that I drafted for a bankruptcy appeal. The final opinion addressed two separate appeals arising from two adversary cases, as well as a cross-appeal.

III. Rose's Appeal of Adversary Case No. 17-04104

The Rose Parties appeal from the bankruptcy court's judgment in favor of the Aaron Parties. In their appeal, the Rose Parties complain that the bankruptcy court erred in awarding the Aarons over \$1.1 million in actual damages for breach of their lease agreement; finding that Rose committed theft by "coercion" under TTLA; and awarding McLaughlin \$51,200.00 in damages that were premised on his alleged "conclusory" testimony.

A. The Aarons' Damages Award

The Rose Parties contest the bankruptcy court's damages award for the Aarons on the following grounds: that the Aarons did not actually incur such damages; that the Aarons do not have the standing, capacity, or any other right to recover damages incurred by Broken Arrow; and that the bankruptcy court did not apply a recognized measure of damages. Although the court disagrees with the Rose Parties' allegations that the Aarons did not incur damages separate from Broken Arrow, it agrees that the bankruptcy court failed to apply an appropriate measure of damages when it awarded the Aarons \$1,109,000.00 for injuries caused by Rose's breach of the Lease.

1. The Aarons' Ability to Recover Damages

The Rose Parties argue that the Aarons did not incur or sustain any pecuniary loss and, accordingly, failed to establish an essential element of their claim. The Aaron Parties contend that

the Rose Parties' complaints with the bankruptcy court's damages award are issues of fact that require the "clearly erroneous" standard of review. Accordingly, the Aaron Parties argue that the Rose Parties have failed to establish that the bankruptcy court committed clear error in its damages findings and award. For the following reasons, the court agrees with the Aaron Parties.

As part of a valid breach-of-contract claim, a plaintiff must prove that he or she "sustained damages due to the breach." *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019); *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 502 n.21 (Tex. 2018); *accord Lamar Cnty. Elec. Coop. Ass'n v. McInnis Bros. Constr., Inc.*, No. 4:20-CV-930, 2021 WL 1061188, at *5 (E.D. Tex. Mar. 19, 2021). According to the Texas Supreme Court, "[t]he universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained." *Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952); *accord Hooks v. Samson Lone Star, Ltd. P'ship*, 457 S.W.3d 52, 68 (Tex. 2015). In its Memorandum Opinion, the bankruptcy court concluded:

The Aarons presented sufficient and credible evidence establishing that they paid at least \$1,109,000.00 for improvements to the Aaron Ranch. . . . Lori Aaron's unequivocal testimony regarding the damages caused by Rose's preventing them access to the Gainesville Ranch concerns actual amounts paid by the Aarons to improve the Commerce ranch.

The court reviews the factual basis of the bankruptcy court's conclusion for clear error and the conclusions of law underlying the award *de novo*. *Eni US Operating Co., Inc.*, 919 F.3d at 941.

The Rose Parties point to testimony elicited from Lori at trial, during which she was asked: "And do you know, ma'am, that the majority of these improvements and construction expenses that you're referring to, . . . the majority of those expenses were actually paid by Broken Arrow Cattle Company, correct?" Lori responded, "Yes. Those have always run like this, always."

Later, Lori was asked: “do you know of any amount that Aaron Ranch itself paid for any improvements out of the Aaron Ranch bank account for these improvements at the Commerce facilities?” Lori answered, “I can’t tell you right now how it’s broken out.” The Rose Parties, however, neglect later testimony from Lori in which she was asked: “At the end of the day, does every penny that Broken Arrow spends on – or spent on these improvements come out of you and your husband’s pockets?” Lori responded, “Yes, it does.” Because the bankruptcy court was in a far superior position to make credibility determinations, the court gives significant weight to the bankruptcy court’s evaluation of Lori’s testimony. *See In re Scarbrough*, 836 F.3d at 455; *In re Harwood*, 427 B.R. at 396. Lori’s testimony clearly indicates that the Aarons paid for the expenses out of their own pocket to remedy Rose’s lockout of the Gainesville Ranch. The Rose Parties have not demonstrated that the bankruptcy court committed clear error in its factual determination that the Aarons “paid at least \$1,109,000.00 for improvements to the Aaron Ranch” in response to Rose’s breach. *See Eni US Operating Co., Inc.*, 919 F.3d at 941.

The Rose Parties further assert that the Aarons do not have the right to “recover money allegedly paid by Broken Arrow.” Specifically, the Rose Parties argue that the Aarons cannot recover Broken Arrow’s damages because it is a separate legal entity. Again, the Rose Parties’ theory misses the mark. The Aarons were not awarded and, apparently, did not seek damages incurred by Broken Arrow.¹ Rather, the Aarons sought to recover damages that they incurred. Indeed, Lori, Phillip, and Aaron Ranch were the parties to the Lease, which served as the basis

¹ Rose spends a significant portion of her briefing discussing a partner’s inability to recover damages incurred by the partnership. As Rose acknowledges, the Aarons did not argue that they should be able to recover Broken Arrow’s damages, nor do they assert such an argument on appeal. Rather, the Aarons seek to recover only the damages they themselves incurred. Thus, the court will not address whether Lori and Phillip, as partners, could recover Broken Arrow’s damages.

for their claim; Broken Aaron, however, was not a party to the Lease. The Aarons used Broken Arrow merely as an intermediary to cover the costs associated with the move from the Gainesville Ranch to the Commerce Ranch. Ultimately, however, every “penny” that the Aarons spent to remedy Rose’s breach of the Lease came from their “pockets.” Accordingly, the bankruptcy court expressly concluded that Lori, Phillip, and Aaron Ranch sustained the damages caused by Rose’s breach of the Lease. In fact, the bankruptcy court never discussed Broken Arrow’s damages. Rose has not demonstrated that the bankruptcy court committed clear error in its damages determination that the Aarons sustained injury from Rose’s breach or that the determination is based on an incorrect legal standard. *See Eni US Operating Co., Inc.*, 919 F.3d at 941.

2. The Appropriate Measure of Damages

The Rose Parties also challenge the Aarons’ damages award on the grounds that the bankruptcy court failed to apply a cognizable measure of damages. The Aaron Parties contend that the bankruptcy court “properly concluded that as a direct and natural result of Rose’s breach, the Aarons were forced to incur expenses to accommodate the horses they purchased from Rose.” The Aaron Parties argue that the court should apply a clear-error standard of review. Damages, however, “must be measured by a legal standard, and that standard must be used to guide the fact-finder in determining what sum would compensate the injured party.” *Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126, 148 (Tex. App.—Dallas 2012, no pet.); *accord David Hoppenstein Fam., Ltd. v. Zargaran*, No. 05-16-01376-CV, 2018 WL 2926376, at *6 (Tex. App.—Dallas June 8, 2018, no pet.) (mem. op.). Accordingly, “[d]etermining the proper measure of damages is a question of law for the court.” *Parkway Dental Assocs., P.A. v. Ho & Huang Props., L.P.*, 391 S.W.3d 596, 607 (Tex. App.—Houston [14th Dist.] 2012, no pet.). As a question of law, the

court will apply the *de novo* standard of review to determine if the bankruptcy court applied the correct measure of damages. See *Eni US Operating Co., Inc.*, 919 F.3d at 941.

“The goal in measuring damages for a breach-of-contract claim is to provide just compensation for any loss or damage actually sustained as a result of the breach.” *Parkway Dental Assocs., P.A.*, 391 S.W.3d at 607. Accordingly, “[t]he universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained.” *CQ, Inc. v. TXU Min. Co., L.P.*, 565 F.3d 268, 278 (5th Cir. 2009) (quoting *Abraxas Petroleum Corp. V. Hornburg*, 20 S.W.3d 741, 760 (Tex. App.—El Paso 2000, no pet.)). Thus, “a party generally should be awarded neither less nor more than his actual damages.” *Id.*; *Sharifi*, 370 S.W.3d at 148.

“Damages for breach of contract protect three interests: a restitution interest, a reliance interest, and an expectation interest.”² *Sharifi*, 370 S.W.3d at 148 (quoting *Chung v. Lee*, 193 S.W.3d 729, 733 (Tex. App.—Dallas 2006, pet. denied); accord *Norhill Energy LLC v. McDaniel*, 517 S.W.3d 910, 917 (Tex. App.—Fort Worth 2017, pet. denied); see also *Hector Martinez & Co. v. S. Pac. Transp. Co.*, 606 F.2d 106, 108 n.3. (5th Cir. 1979), cert. denied, 446 U.S. 982 (1980). Expectancy damages “restore the injured party to the economic position it would have occupied had the contract been performed.” *Parkway Dental Assocs., P.A.*, 391 S.W.3d at 607. Reliance damages, on the other hand, “put the injured party in as good an economic position as it would have occupied had the contract not been made.” *Id.* at 607-08; accord *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 866 (5th Cir. 1999) (“Reliance

² The parties do not contend that restitution damages should be awarded in this case, and the court has not seen evidence to indicate that restitution damages are appropriate.

damages seek to put the injured party in the position he would have been in had he not relied on the promise.”).

In a breach-of-contract case, an injured party may recover either expectation or reliance damages, but not both. *Transverse, L.L.C. v. Iowa Wireless Servs., L.L.C.*, 617 F. App’x 272, 280 (5th Cir. 2015); *Amigo Broad., LP v. Spanish Broad. Sys., Inc.*, 521 F.3d 472, 485 (5th Cir. 2008) (citing RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981)); *Siam v. Mt. Vista Builders*, 544 S.W.3d 504, 516 (Tex. App.—El Paso 2018, no pet.). “A party is entitled to sue and seek damages on alternative theories but is not entitled to recover on both theories; to do so is considered equivalent to a ‘double recovery.’” *Sharifi*, 370 S.W.3d at 149 (quoting *Foley v. Parlier*, 68 S.W.3d 870, 884 (Tex. App.—Fort Worth 2002, no pet.)). Thus, “[a] plaintiff who has two inconsistent remedies must elect between them.” *Id.*

The bankruptcy court did not correctly apply either the expectancy or reliance methods of calculating damages. The court will first address the reliance method as that is the method that the Aaron Parties claim the bankruptcy court applied, although the bankruptcy court did not expressly apply this method. Reliance damages “reimburse one for expenditures made towards the execution of the contract in order to restore the status quo before the contract.” *Sharifi*, 370 S.W.3d at 149; *accord Amigo Broad., LP*, 521 F.3d at 485. Thus, reliance damages “include expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.” *Nutrasep LLC v. TOPC Tex. LLC*, 309 F. App’x 789, 792 n.14 (5th Cir. 2008); *Siam*, 544 S.W.3d at 516. Accordingly, any expenditures made after the breaching party repudiates an obligation “cannot reasonably be said to have been in reliance” on the

obligation. *Conner v. Lavaca Hosp. Dist.*, 267 F.3d 426, 436 (5th Cir. 2001) (noting that reliance on a contract is not reasonable after the other party unequivocally repudiates its obligations); *see Universal Truckload, Inc. v. Dalton Logistics, Inc.*, 946 F.3d 689, 697 (5th Cir. 2020) (recognizing the holding in *Conner*).

Here, after Rose breached the Lease by locking the Aarons out of the Gainesville Ranch, rather than look for a comparable property to lease, the Aarons decided to make permanent improvements to their Commerce Ranch in order to accommodate their horse-breeding operations. Evidence elicited at trial reveals that the Aarons spent funds on improving fencing, purchasing equipment, building a breeding barn, and making other improvements, including installing concrete, a pond, new offices, lighting, furniture, pens, paddocks, and other structures. Lori testified that at a “minimum” the improvements to the Commerce Ranch cost a total of \$1,109,000.00. In awarding the Aarons their requested damages for improvements to the Commerce Ranch, the bankruptcy court concluded that the improvements “were reasonable and necessary to accommodate the horses and to continue the breeding program they had planned to conduct at the Gainesville Ranch.”

By awarding the Aarons the cost for permanent improvements to their Commerce Ranch, the bankruptcy court failed to put the Aarons in the position they would have been in had they not entered into the Lease. *See Range v. Calvary Christian Fellowship*, 530 S.W.3d 818, 831 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (rejecting a theory of reliance damages that amounted to the cost to buy land and build a new facility because “the damages [the plaintiffs] sought could not be reliance damages, because these amounts would not restore [the plaintiffs] to the positions they occupied before [the breach], but would instead enrich them by more than \$1.87

million”). If the Aarons had not entered the Lease with Rose, they would not have had access to any of the facilities or equipment at the Gainesville Ranch that they sought to replicate at their Commerce Ranch. The \$1,109,000.00 in improvements were not made in reliance on the lease, rather, they were made as a result of Rose’s breach. Moreover, as Rose clearly breached the parties’ lease when she locked the Aarons out of the Gainesville Ranch, any amount spent after to remedy the breach cannot be said to be in reliance of the lease. *See Conner*, 267 F.3d at 436; *Universal Truckload, Inc.*, 946 F.3d at 697.

Instead of applying the reliance measure, the bankruptcy court apparently applied the expectancy method of calculating damages.³ The expectancy measure of calculating damages seeks “to restore the injured party to the economic position it would have occupied had the contract been performed.” *First Cash, Ltd. v. JQ-Parkdale, LLC*, 538 S.W.3d 189, 201 (Tex. App.—Corpus Christi-Edinburg 2018, no pet.); *see Elsas v. Yakkassippi, L.L.C.*, 746 F. App’x 344, 348 (5th Cir. 2018); *Sharifi*, 370 S.W.3d at 148. “To restore an injured party to the position she would have been in had the contract been performed, it must be determined what additions to the injured party’s wealth have been prevented by the breach and what subtractions from her wealth have been caused by it.” *Picard v. Badgett*, No. 14-19-00006-CV, 2021 WL 786817, at *17 (Tex. App.—Houston [14th Dist.] Mar. 2, 2021, no pet.) (mem. op.); *Sharifi*, 370 S.W.3d at 148.

³ The bankruptcy court concluded: “If the Lease had not been terminated, the Aarons *would have had* the use of the Gainesville Ranch for their new performance quarter horse business for five years as well as the use of the Aaron Ranch in Commerce for their existing business. . . . Rose’s termination of the Lease also forced the Aarons to spend large sums of money right away rather than spreading out payments over five years.” Although the bankruptcy court did not expressly adopt the expectancy measure of damages, its statements reflect the application of this measure of damages.

In the breach-of-lease context, Texas courts recognize that “one potential measure of the leaseholder’s expectancy damages is the rent differential.” *First Cash, Ltd.*, 538 S.W.3d at 201. Contrary to Rose’s assertions, there is no Texas authority that suggests the rent differential method is mandatory in cases where it can be applied. Thus, absent contrary authority, a plaintiff may elect any permissible measure of damages, including the rent differential, but is not required to, if other methods are available. *Sharifi*, 370 S.W.3d at 149. Therefore, it was not erroneous for the bankruptcy court not to apply the rent differential method of calculating damages.

The bankruptcy court, however, failed to correctly apply the expectancy measure of calculating damages. Under the terms of the Lease, the Aarons leased the Gainesville Ranch for five years in return for monthly lease payments of \$41,666.67, for a total payment of \$2.5 million. Thus, had the Lease been fully performed, the Aarons would have had the use of the Gainesville Ranch for five-years and they would have spent \$2.5 million in lease payments.⁴ Rather than place the Aarons in the position of having use of the Gainesville Ranch for five years, the bankruptcy court awarded the Aarons the cost of permanent improvements to the Commerce Ranch. The bankruptcy court failed to account for the amount in lease payments that the Aarons were not required to make. Accordingly, the bankruptcy court’s damages award placed the Aarons in a better position than they would have been in had the lease been fully performed. *See Reavis v. Taylor*, 162 S.W.2d 1030, 1038 (Tex. App.—Eastland 1942, writ ref’d w.o.m.) (finding that the plaintiff’s damages were properly reduced by the amount of unpaid rent because, “[a]lthough

⁴ The Aarons made their monthly lease payments in August, September, and October 2013. The bankruptcy court concluded that Rose breached the parties’ Lease when she locked the Aarons out of the Gainesville Ranch on October 3, 2013. The record does not indicate that any additional lease payments were made after October 2013. Thus, it would appear that the Aarons paid approximately \$125,000.00 in lease payments with \$2,375,000.00 remaining on the lease.

evicted from the premises, [the plaintiff] profited or was saved the expenditure of said \$480, unpaid rental on the lease contract”).

The bankruptcy court did not correctly apply either the reliance or expectancy methods of calculating damages, and, therefore, erred in its damages calculation. Applying the *de novo* standard of review, the court reverses the bankruptcy court’s damages award of \$1,109,000.00 as it relates to the Aaron Parties’ breach-of-contract claim.

Applicant Details

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 Last Name **Hyde**
 Citizenship Status **U. S. Citizen**
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Zip
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Country
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Applicant Education

BA/BS From **San Francisco State University**
 Date of BA/BS **May 2011**
 JD/LLB From **University of California, Berkeley**
School of Law
<https://www.law.berkeley.edu/careers/>
 Date of JD/LLB **May 14, 2022**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Ecology Law Quarterly**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/
 Externships **Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

February 12, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am a 3L at Berkeley Law seeking a 2022 term clerkship in your chambers. I am an aspiring public interest litigator with a commitment to and extensive professional background in public interest work. I also have valuable experience in the federal judiciary: I externed for Judge Haywood Gilliam on the Northern District of California and I am currently an extern for Judge Marsha Berzon on the Ninth Circuit. For a number of reasons, I believe I would make a strong addition to your team.

First, I have developed a strong intellectual curiosity and broad interest in the law generally. Although I came to law school intending to focus on environmental issues, I have fallen in love with a wide range of subjects, especially the legal theory explored in doctrinal courses. Second, I have made it a priority to develop legal research and writing skills.

To that end, my externship on the Northern District of California was particularly valuable. I was able to look back on a mere fourteen weeks and say confidently that I progressed in leaps and bounds: while I began the experience with little sense of how to properly research and compose draft orders, I finished strong. In fact, based on my research presentation concerning interpretation of a particular federal statute, I was able to convince Judge Gilliam to reverse course from a prior ruling on the same law. Additionally, beyond the skills gained, I also enjoyed learning new facets of the law with every new case. I appreciated the motivation to get the case *right* rather than merely argue a side as an advocate.

Finally, my professional experiences before law school have honed my skills and goals. For example, I spent two years as an infantryman in the National Guard developing intangible skills like attention to detail, teamwork, determination, and grit. And I excelled in the process. For example, I was selected out of a 50-man unit during Basic Training to act as Platoon Guide, the top trainee leadership position, responsible for ensuring soldiers were on time and prepared for all training events and acting as liaison between soldiers and drill sergeants. I bring the same focus, work ethic, and drive to my legal education.

I hope to speak with you soon about this fantastic opportunity.

Very respectfully,

Blake Hyde

BLAKE HYDE

1821 N. Bend Drive, Sacramento, CA 95835 • (530) 383-6810 • blake.campbell.hyde@gmail.com

EDUCATION

UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW Juris Doctor	San Francisco, CA 2019 – 2022
<ul style="list-style-type: none"> • <i>Associate Editor, Ecology Law Quarterly</i> • <i>Environmental Law Clinic</i> 	
AMERICAN UNIVERSITY, SCHOOL OF INTERNATIONAL SERVICE Master of Arts, Global Environmental Policy	Washington, DC 2011 – 2013
SAN FRANCISCO STATE UNIVERSITY Bachelor of Arts, <i>magna cum laude</i> , Political Science	San Francisco, CA 2005 – 2011

EXPERIENCE

COURT OF APPEALS FOR THE NINTH CIRCUIT, Judge Marsha Berzon <i>Spring Extern</i>	San Francisco, CA Jan. 2022 – May 2022
<ul style="list-style-type: none"> • Drafting bench and disposition memoranda • Compiling bench books and taking notes for en banc conference calls 	
REMY MOOSE MANLEY, LLP <i>Summer Associate</i>	Sacramento, CA May 2021 – Aug. 2021
<ul style="list-style-type: none"> • Researched and drafted memoranda on various environmental issues, most often dealing with California law • Wrote articles for the California Land Use Law & Policy Reporter and blog posts for the firm's website 	
NORTHERN DISTRICT OF CALIFORNIA, Judge Haywood S. Gilliam <i>Spring Extern</i>	Oakland, CA Jan. 2021 – May 2021
<ul style="list-style-type: none"> • Researched and drafted bench memoranda and draft orders, addressing procedural motions in a variety of cases, from antitrust to human trafficking 	
EARTHJUSTICE <i>Fall Extern</i>	San Francisco, CA Aug. 2020 – Dec. 2020
<ul style="list-style-type: none"> • Researched and drafted memoranda covering a variety of topics in federal environmental law • Reviewed notice-and-comment records from environmental agencies and analyzed for sufficiency • Helped prepare for civil and criminal hearings, case management conferences, and bench trials 	
GEORGETOWN CLIMATE CENTER <i>Research Assistant</i>	Washington, DC May 2020 – Aug. 2020
<ul style="list-style-type: none"> • Researched and drafted reports and case studies on local, regional, state and national laws and policies concerning climate change adaptation • Organized and submitted entries for the Adaptation Clearinghouse, a database of resources for climate adaptation policymakers, and Managed Retreat Toolkit, which highlights best practices for coastal retreat 	
WORLD RESOURCES INSTITUTE <i>Program Coordinator</i>	Washington, DC Jan. 2019 – Aug. 2019
<ul style="list-style-type: none"> • Managed complex project budgets by tracking spend-down rates and reporting to funders, processing invoices and financial reports; organizing project finances; and developing proposals to donors • Led project grant management by submitting formal grant proposals, drafting and submitting grant budgets, tracking deliverables and reporting, and tracking donors and contacts 	

ARMY NATIONAL GUARD

Infantryman (Rank: Specialist)

Silver Spring, MD

Aug. 2016 – Jul. 2018

- Earned the top leadership position in Basic Training platoon, overseeing the day-to-day logistics of the platoon and acting as liaison between enlisted and non-commissioned officers
- Managed personnel, ensuring soldiers were unit-cohesive, equipped, prepared, and aware of evolving training requirements for all training events

BOOZ ALLEN HAMILTON

DTRA/CBEP Ethiopia Project Lead

Lorton, VA

Jun. 2015 – Aug. 2016

- Advised and assisted officials at the Defense Threat Reduction Agency's Cooperative Biological Engagement Program to help the Government of Ethiopia track and contain hazardous bio materials
- Managed all stages of the contract acquisition process for large-scale international development contracts such as for the design of a multi-million-dollar public health center in Ethiopia

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		2021 Fall		
<u>Course</u>		<u>Description</u>	<u>Units</u>	<u>Law Units</u>
LAW	222	Federal Courts	4.0	4.0
		Erwin Chemerinsky		P
LAW	241	Evidence	4.0	4.0
		Andrea Roth		H
LAW	291A	Environ Law Cl Sem	2.0	2.0
		Claudia Polsky		CR
LAW	295.5E	Environmental Law Clinic	4.0	4.0
				CR
Units Count Toward Experiential Requirement				
		Claudia Polsky		
		Sabrina Ashjian		
		Steven Castleman		
		Antoinette Cordero		
			<u>Units</u>	<u>Law Units</u>
Term Totals			14.0	14.0
Cumulative Totals			73.0	73.0

  Carol Rachwald, Registrar

Berkeley Law

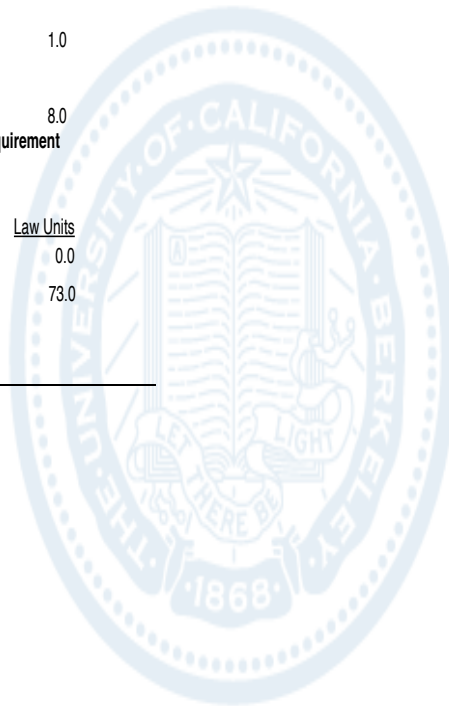
University of California

Office of the Registrar

Blake C Hyde
 Student ID: 3036453528
 Admit Term: 2020 Fall

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 Page 2 of 2

		2022 Spring			
Course		Description	Units	Law Units	Grade
LAW	226.12	Media Law&the First Amendment Geoffrey King Diana Baranetsky	1.0	1.0	
LAW	234.21	Dismantling Mass Incarceration Antony Cheng	1.0	1.0	
LAW	272.2A	Environmental Justice in Pract Suma Peesapati Veronica Eady	1.0	1.0	
LAW	274.7	Environ Law Colloqu Holly Doremus Daniel Farber	1.0	1.0	
LAW	295.8B	Judicial Externships: Bay Area	8.0	8.0	
Units Count Toward Experiential Requirement					
Susan Schechter					
			<u>Units</u>	<u>Law Units</u>	
Term Totals			0.0	0.0	
Cumulative Totals			73.0	73.0	




 Carol Rachwald, Registrar

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510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	-	High Honors	CR	-	Credit
H	-	Honors	NP	-	Not Pass
P	-	Pass	I	-	Incomplete
PC	-	Pass Conditional or Substandard Pass (1997-98 to present)	IP	-	In Progress
NC	-	No Credit	NR	-	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

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---ALL COLLEGE---	---SFSU TOTALS---	-UA-	-UE-	-GP-	
40.0 43.0 139.9	40.0 43.0 139.9	12.0	15.0	42.9	DEAN'S LIST
3.49	3.49		3.57		

SPRING 2007

PSYCHOLOGY

BIOL	100	HUMAN BIOLOGY	3.0	A	12.0
PHIL	330	POLITICAL PHILOSOPHY	3.0	B+	9.9
AIIS	460	POWER&POLT IN AM IND HIST	3.0	A	12.0
PSY	494	COGNITIVE PSYCHOLOGY	3.0	A	12.0
BIOL	330	HUMAN SEXUALITY	3.0	A	12.0
PSY	450	VARIATIONS HUMAN SEXUALTY	3.0	A	12.0

---ALL COLLEGE---	---SFSU TOTALS---	-UA-	-UE-	-GP-	
58.0 61.0 209.8	58.0 61.0 209.8	18.0	18.0	69.9	DEAN'S LIST
3.61	3.61		3.88		

FALL 2007

PSYCHOLOGY

ANTH	100	INTRO BIOLOGICL ANTH	3.0	A	12.0
ANTH	310	FAMILY,KIN & COMMUNITY	3.0	A-	11.1
ANTH	300	FOUNDATIONS ANTH-HISTORY	3.0	A	12.0
ANTH	570	ANTHROPOLOGY OF RELIGION	3.0	A	12.0

---ALL COLLEGE---	---SFSU TOTALS---	-UA-	-UE-	-GP-	
70.0 73.0 256.9	70.0 73.0 256.9	12.0	12.0	47.1	DEAN'S LIST
3.67	3.67		3.92		

COURSE	COURSE TITLE	UNIT	GRD	GRDPT	DATE	COMMENTS
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SPRING 2008

ANTHRO

ANTH	325	CLASS CROSS CULTURAL ANAL	3.0	A	12.0
ANTH	319	CULT OF MID EAST & N AFR	3.0	B+	9.9
BIOL	318	OUR ENDANGERED PLANET	3.0	A-	11.1
ANTH	120	INTRO SOCIAL+CULTURL ANTH	3.0	A	12.0
ANTH	588	ANTH & HUMAN RIGHTS	4.0	B+	13.2

---ALL COLLEGE---	---SFSU TOTALS---	-UA-	-UE-	-GP-	
86.0 89.0 315.1	86.0 89.0 315.1	16.0	16.0	58.2	DEAN'S LIST
3.66	3.66		3.63		

FALL 2008

ANTHRO

SOC	471	SOCIETL CHNG & DEVELOPMT	4.0	A-	14.8
SOC	490	SOC OF POPULAR CULTURE	4.0	A-	14.8
HUM	390	IMAGES OF EROTICISM	3.0	A	12.0
SOC	300	SOCIOLOGICAL ANALYSIS	4.0	A-	14.8

---ALL COLLEGE---	---SFSU TOTALS---	-UA-	-UE-	-GP-	
101.0 104.0 371.5	101.0 104.0 371.5	15.0	15.0	56.4	DEAN'S LIST
3.67	3.67		3.76		

SPRING 2009

POLI SCI

12/26/2014

SFSU Unofficial Transcript

PLSI	300	SCIENTIFIC INQUIRY-PL SCI	4.0	A	16.0
PLSI	250	COMPARATIVE POLITICS	3.0	A	12.0
PLSI	410	MIDDLE EAST POLITICS	4.0	A-	14.8
PLSI	275	INTRO TO POLITICAL THEORY	3.0	A	12.0

---ALL COLLEGE---			---SFSU TOTALS---			-UA-	-UE-	-GP-
115.0	118.0	426.3	115.0	118.0	426.3	14.0	14.0	54.8 DEAN'S LIST
3.70			3.70			3.91		

COURSE	COURSE TITLE	UNIT	GRD	GRDPT	DATE	COMMENTS
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FALL	2009	SOCIOLOGY				
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PLSI	477	CONGRESS + THE PRESIDENCY	4.0	A	16.0
PLSI	473	CALIF POLITICS AND GOVT	4.0	A	16.0
PLSI	360	DEVEL AMERICAN THOUGHT	4.0	A	16.0
PLSI	342	STRATEGY AND WAR	4.0	A-	14.8
PLSI	721	STATE-SOCIETY RELATIONS	4.0	A	16.0

---ALL COLLEGE---			---SFSU TOTALS---			-UA-	-UE-	-GP-
135.0	138.0	505.1	135.0	138.0	505.1	20.0	20.0	78.8 DEAN'S LIST
3.74			3.74			3.94		

-----ADJUSTMENT ENTRY-----

		U/ATT	UE	GP	U/ACC
CITY CLG SN FRNCSCO		1.0	1.0	2.0	1.0

---ALL COLLEGE---			---SFSU TOTALS---		
136.0	139.0	507.1	135.0	138.0	505.1

ALL COLLEGE GPA	SFSU GPA
3.72	3.74

DEGREE EARNED: 05/22/2010 Bachelor of Arts

Unit total for "W" grades = 0 units. Beginning Fall 2009, undergraduate students may withdraw from a maximum of 18 units taken through regular university ("W" grade). Withdrawal from a semester ("WM" grade) are excluded from the 18 unit maximum withdrawal limit.

COURSE	COURSE TITLE	UNIT	GRD	GRDPT	DATE	COMMENTS
--------	--------------	------	-----	-------	------	----------

STUDENT STATUS:

STUDENT LEVEL: UNDERGRADUATE	GRADUATE STANDING: NONE
PRIMARY MAJOR: POLITICAL SCIENCE	CREDENTIAL OBJ: NONE
SECONDARY MAJOR: NONE	
PRIMARY MINOR: NONE	

LEGEND

12/26/2014

SFSU Unofficial Transcript

CEU = CONTINUING EDUCATION UNITS, CSL = COMMUNITY SERVICE LEARNING CREDIT
E = EXTENSION CREDIT C = OPEN UNIVERSITY, RESIDENT CREDIT
S = SPECIAL SESSION, RESIDENT CREDIT, * = NO DEGREE CREDIT COURSE
GW = GRADUATION WRITING ASSESSMENT REQUIREMENT (GWAR) COURSE
BEGINNING SUMMER 2002, STUDENTS ENROLLED IN 'N' AND 'X' COURSES CAN EARN A
MAXIMUM OF 24 UNITS TOWARDS AN UNDERGRADUATE DEGREE OR 6 UNITS TOWARDS A
GRADUATE DEGREE. N = OPEN UNIVERSITY AND SPECIAL SESSION FOR NON-
MATRICULATED STATUS (RESIDENT CREDIT), X = EXTENSION FOR MATRICULATED OR
NON-MATRICULATED STATUS (NONRESIDENT CREDIT)
CC = COMMUNITY COLLEGE, A MAXIMUM OF 70 UNITS ALLOWABLE
ACAD RENEWAL = COURSE GRADE OMITTED FROM CALCULATION OF MINIMUM GPA REQUIRED
FOR BACHELOR'S DEGREE PER CSU EXECUTIVE ORDER #1037

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DATE PRINTED				PAGE
11/18/15				1 OF 1

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AMERICAN UNIVERSITY
ACADEMIC RECORD WASHINGTON, D.C.

Course Number	Course Title	Hrs	Crs Val	Grd	Quality Points
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FALL 2011

DEGREE OBJECTIVE: MASTER OF ARTS

SIS-609-001	CONF ONLY & RES:THEORY & PRAC	03.00	A	12.00	
SIS-620-003	STDS IN GLOBAL ENVIRN POLITICS				
	CLIMATE CHANGE & CONFLICT	03.00	A-	11.10	
SIS-660-001	ENVIRONMENT AND POLITICS	03.00	A-	11.10	
AU SEM SUM: 9.00HRS ATT 9.00HRS ERND 34.20QP 3.80GPA					

SPRING 2012

TOOLS OF RESEARCH PASSED:

SIS-602-003	TOOL OF RESEARCH--SPANISH				
	AU-UNIV FOR PEACE EXCHANGE				
	RESEARCH METHODS	03.00	B+	09.90	
SIS-602-004	AU-UNIV FOR PEACE EXCHANGE				
	ECOLOGICAL FOUND/SUS LAND USE	03.00	B-	08.10	
SIS-602-007	AU-UNIV FOR PEACE EXCHANGE				
	NATURAL RES MGMT FIELD COURSE	03.00	A-	11.10	
SIS-602-009	AU-UNIV FOR PEACE EXCHANGE				
	CLIMATE CHANGE ADAPT & MITIG	03.00	C	06.00	
AU SEM SUM: 12.00HRS ATT 12.00HRS ERND 35.10QP 2.92GPA					

FALL 2012

ECON-603-001	INTRO TO ECONOMIC THEORY	03.00	B+	09.99	
ENVS-580-001	ENVIRONMENTAL SCIENCE I	03.00	B-	08.01	
SIS-620-002	STDS IN GLOBAL ENVIRN POLITICS				
	POL ECOL OF FOOD & AGRICULTURE	03.00	B+	09.99	
AU SEM SUM: 9.00HRS ATT 9.00HRS ERND 27.99QP 3.11GPA					

SPRING 2013

SIS-616-001	INTERNATIONAL ECONOMICS	03.00	C+	06.99	
SIS-619-014	SPECIAL STUDIES IN INT'L POL				
	INSURGENCY & COUNTERINSURGENCY	03.00	A	12.00	
SIS-793-010	PRACTICUM IN INT'L AFFAIRS				
	FOREIGN/DEFENSE POL: MID-EAST	03.00	B	09.00	
AU SEM SUM: 9.00HRS ATT 9.00HRS ERND 27.99QP 3.11GPA					

DEGREE AWARDED:

MASTER OF ARTS

DEGREE DATE:

05/12/13

MAJOR:

GLOBAL ENVIRONMENTAL POLICY

GRADUATING GPA:

3.21

PROGRAM GPA:

3.21

END OF TRANSCRIPT


UNIVERSITY REGISTRAR

THE OFFICIAL SIGNATURE OF THE UNIVERSITY REGISTRAR IS BLUE WITH A BLUE BACKGROUND

The American University ♦ Office of the University Registrar ♦ 4400 Massachusetts Ave NW ♦ Washington DC 20016 ♦ (202) 885-2022

For detailed information about transcripts prior to Fall 1978, GPA, Course Numbering, Minimum Degree Requirements, and other transcript related topics, please visit www.american.edu/provost/registrar.

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Accreditation: American University is accredited by the Middle States Association of Colleges and Schools, Commission on Higher Education, 3624 Market Street, Philadelphia, PA 19104.

Academic Calendar: The academic calendar is divided into fall and spring semesters of approximately 15 weeks each and summer sessions of varying length.

Grade Point Average (GPA): There is no official percentile equivalent for grades at American University. The GPA listed at the end of each semester is for that semester only. The cumulative grade point average is shown only when a degree has been granted. The GPA includes A through F and FX grades and excludes courses affected by the Freshman Forgiveness Rule (see website). The graduate cumulative GPA includes only graduate-level courses. American University does not rank its students.

Grading System Effective Fall 2012:

Grade	Quality Points (QP)	In GPA
A Excellent	4.00	yes
A- 3.67	yes	
B+ 3.33	yes	
B Good 3.00	yes	
B- 2.67	yes	
C+ 2.33	yes	
C Satisfactory 2.00	yes	
C- 1.67	yes	
D Poor 1.00	yes	
F Academic Fail 0.00	yes	
FX Administrative Fail in Course for Grade 0.00	yes	
I Incomplete 0.00	no	
IP Course in progress 0.00	no	
L Audit (no credit) 0.00	no	
N No grade submitted or invalid grade 0.00	no	
P Pass (Performance no less than C for undergraduates or B for graduate students) 0.00	no	
SP Satisfactory Progress (graduate only) 0.00	no	
UP Unsatisfactory Progress (graduate only) 0.00	no	
ZL Administrative withdrawal from audit 0.00	no	
W Withdrawal (after the final date for adding a course) 0.00	no	
ZX Administrative Fail in Pass/Fail Course 0.00	no	
FZ Academic Fail in Pass/Fail Course 0.00	no	

Academic Fail: Academic fail indicates the student's continued enrollment in the course and that he or she did not satisfy the instructor's summative requirements for passing the course.

Administrative Fail: Administrative fail is assigned by the instructor in lieu of a grade of F when a student never attended or ceased attending the class, rendering an assessment of academic performance impossible.

Transcript Notations:

Repeat Courses: A symbol of *R* follows the grade entry.

Comprehensive Examinations: SAT = Satisfactory; DIS = Distinction

General Education Codes: To the right of the course title (see website)

Other Codes: CB = Community Based Learning; H = Honors; S = Study Abroad; UC = University College

Grading System Fall 1978 to Summer 2012:

Grade	Quality Points (QP)	In GPA
A Excellent	4.0	yes
A- 3.7	yes	
B+ 3.3	yes	
B Good 3.0	yes	
B- 2.7	yes	
C+ 2.3	yes	
C Satisfactory 2.0	yes	
C- 1.7	yes	
D Poor 1.0	yes	
F Fail 0.00	yes	
X Fail: Administrative penalty 0.00	yes	
I Incomplete 0.00	no	
IP In progress 0.00	no	
L Audit 0.00	no	
N No grade reported or invalid grade 0.00	no	
P Pass (Performance no less than C for undergraduates or B for graduate students) 0.00	no	
W Withdrawal (after the final date for adding a course) 0.00	no	
ZF Fail: Pass/Fail registration 0.00	no	
ZL Administrative withdrawal from audit 0.00	no	
ZX Fail: Administrative penalty on Pass/Fail registration 0.00	no	

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February 7, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am writing to highly recommend Mr. Blake Hyde for a position as your law clerk. Mr. Hyde was a student in my Federal Courts class in the Fall 2021 semester. He was among the most frequent participants in class discussions and he came to office hours almost every day. I thus had many opportunities to interact with him and I was tremendously impressed. I believe that he will be an excellent law clerk and lawyer.

Mr. Hyde's comments during class discussions and his questions at office hours reflected very thorough preparation of the materials and careful thought about it. His classroom participation was outstanding: his comments were original, insightful, and clearly stated. In a class of 165 students, his regular participation was truly noteworthy. His questions, during class and in office hours, were sophisticated and reflected a deep understanding of the very difficult material covered in a federal courts class.

His comments and questions in class and in office hours caused me to be very impressed by his diligent hard work, his keen intelligence, and his ability to express himself exceptionally well. I have no doubt that he will put in the effort and has the ability to excel at whatever he does. I also found he was a pleasure to talk with and I know you would enjoy working with him.

I recommend him to you enthusiastically and without reservation.

Sincerely,

Erwin Chemerinsky

Erwin Chemerinsky - echemerinsky@law.berkeley.edu - 5106426483

February 12, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Re: Blake Hyde, UC Berkeley School of Law, Class of 2022

Dear Judge Bates:

I write to enthusiastically recommend Blake Hyde for a clerkship in your chambers. Blake was a standout student in my Fall 2021 Evidence class, and I got to know him well in office hours and because of his interest in criminal justice reform. He's a very bright, very intellectually curious, engaging, hard working, no-excuses Army type but also a Greenpeace organizer not easily pigeonholed. I highly recommend him for a clerkship at any level.

Blake easily earned an Honors in my Evidence class (meaning he was easily within the top 40% of 110 self-selecting engaged students; there was a 50-person waitlist and I made clear students should be prepared to work very hard). The grade was based on a difficult 50-question multiple choice test and policy essay. He also wrote a great (ungraded) motion in limine assignment on a Confrontation Clause issue (both Bruton and Crawford issues) and hearsay issue (statement against interest).

But beyond the grade, Blake showed up to nearly every office hours session for a bit (3 times a week, for an hour, shortly after class). Normally, this would be the sign of a "gunner," and sometimes that can be annoying, if the student is simply there to impress the teacher. But Blake is honestly one of the most intellectually curious students I've had in 10 years of teaching at Berkeley, and it's clear these questions just flow out of him. I was always genuinely excited to see him crouched in the hallway outside my door reading, waiting for office hours, and I was genuinely disappointed on days when he wasn't there. Not only that, but his questions are really good questions, questions that I sometimes felt amazed (or even embarrassed) that they had never been asked by another student in 10 years (or considered by me). Just by way of example, he asks questions like, "if the rule of completeness doesn't let a statement in for its truth, can it still be the basis of a jury instruction on self-defense?" "even though Rule 613 and 806 allows a hearsay declarant to be impeached by inconsistency even if they aren't there to explain or deny the inconsistency, you still aren't able to impeach a hearsay declarant with extrinsic evidence under 608 of a specific instance of conduct probative of truthfulness, right?" (answer: no, and according to the Supreme Court in Nevada v. Jackson, that's OK, even though I think it's blatantly unconstitutional under a correct view of 'confrontation'). Blake's questions are smart enough that I was hoping he might be a research assistant for me (he doesn't have the time, with clinic etc.). He's also (unlike "gunners") easy going, self-effacing, and efficient. He only stays long enough to ask his very good questions, and perhaps to hear the question of another student (always asking their permission first).

I find that Blake fits the impressive profile and behavior of other transfer students I have worked with (Blake spent his 1L year at Georgetown). He doesn't take anything for granted or feel entitled; he's very hard working and organized; and he has that "something else" quality that makes him memorable.

Moreover, Blake is a gem of a person, with a unique background worthy of a year's worth of lunches and coffees. Who else can say they were both an Army infantryman and a Greenpeace lead organizer? He's a formal, straight-laced, serious guy who also has a lot of tattoos. Once you meet him, you get it. He's very likeable, for lack of a better word. He's got all of those qualities that are good for clerkships but that don't show up on a transcript—professionalism, good humor, knowing when to talk and when to be quiet, a sense of the value of the other person's time, owning a project and pointing out possible nuances and red flags, rather than just answering the narrow question asked in a "work-to-the-rule" sort of way, confidence without haughtiness, and willingness to push back while still being deferential to authority.

Blake's interest in public service is broad and it will be interesting to see where he lands. He is not a one-issue kind of guy. He is passionate about criminal justice reform but also environmental law and policy. The environmental law clinic here is an intense experience under an intense and highly respected faculty member with 20 years' experience at Cal DOJ (Professor Claudia Polsky), who is an exacting editor who instills in her students (and inspires them to, through her unwavering support and modeling) a very high level of practice. Anyone coming out of that clinic with flying colors would be an excellent judicial clerk.

In sum, Blake would be an excellent judicial clerk. Please do not hesitate to contact me by cell phone, 202-669-6565, or e-mail, aroth@law.berkeley.edu, with any questions.

Very truly yours,

Andrea Roth
Professor of Law
UC Berkeley School of Law

Andrea Roth - aroth@law.berkeley.edu

December 13, 2021

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

We write enthusiastically to recommend Blake Hyde, a student of ours during the Fall 2021 semester, for a judicial clerkship. Although atypical, we here write a joint letter of recommendation because one of us (Steve, an Environmental Law Clinic staff attorney) supervised Blake's live-client work, and the other (Claudia, clinic director) taught the companion seminar, and also had a number of highly positive out-of-class interactions with Blake.

From Steve:

I supervised Blake in a confidential investigation into a local factory's air pollution and its impact on neighboring disadvantaged communities. Blake was one of four students assigned to the investigation. He demonstrated a talent for working collaboratively as part of a team and was proactive with his assignments. For example, he took the lead in cataloguing a large number of community members with complaints about the facility and prioritizing those with the most relevant information for interviews. He then used the information he'd gathered as the factual basis for a draft Complaint, a large part of which he wrote. His work product was superior, evidencing thoughtfulness, imagination, and hard work.

Critically for a potential judicial clerkship, Blake has always been very professional in all his interactions with me and other students. His assignments and time sheets were on time, he responded to email punctually, and he followed through on all tasks without reminders. He is well-organized, passionate about public interest work and, as one might expect of a former National Guard infantryman, mission focused. Blake was a real asset to our Clinic, and an all-around pleasure to work with.

From Claudia:

In addition to Blake's excellent work on the investigation, he was an active, generous, and at times (politely) provocative participant in our weekly clinic seminar. Blake was consistently prepared and on time with assignments; this is not a given in seminar, which is graded P/F, and which lacks the external accountability of our outward-facing client work. Blake was a regular but also appropriately self-regulating contributor to class discussions: he offered his thoughts, and was always attentive to leaving space for others. Blake was also generous, whether in the form of taking the initiative to start a music play list for the class of environmentally oriented songs students had identified as favorites, or offering help when I was laden with props or snacks for class.

Further, Blake was forthright but never confrontational or dogmatic in offering issue perspectives, willing to stake out positions he knew might be unpopular to foster more robust discussion. Such issues included, e.g., whether democratic (rather than more authoritarian) institutions are up to the challenge of reining in climate change, or whether geoengineering, despite its riskiness and technocratic nature, might be necessary to fend off climate catastrophe. As primary instructor of the seminar, I was grateful for these interventions, because they provide learning opportunity that is unavailable when students all either agree with each other or self-censor because they hold minority views.

Additionally, and emblematic of his openness and intellectual curiosity, Blake periodically emailed me to share newspaper stories, links to radio shows, or items in the popular media related to items we had discussed in class or 1-on-1. Most recently, he initiated such an exchange about a planned campus labor strike that complexified the logistics of our final seminar session. I greatly valued these off-curriculum exchanges, and the spirit of ongoing inquiry they embodied.

From both of us:

We suspect you'd find Blake a great asset, and recommend him wholeheartedly for a clerkship. Beyond the specific attributes above, Blake is a lovely, engaged person who is both easy to work with and genuinely curious about other people's life experiences and points of view. We know that in the intimate work setting of judicial chambers, such inter-personal abilities matter deeply.

Either or both of us would be happy to provide additional information or answer any questions with respect to Blake Hyde's candidacy.

Sincerely,

Claudia Polsky, Clinical Professor of Law & Director
& Steve Castleman, Staff Attorney
Environmental Law Clinic

Claudia Polsky - cpolsky@clinical.law.berkeley.edu

Blake Hyde

Address: 1821 N. Bend Drive, Sacramento, CA 95835

Phone: (530) 383-6810

Email: blake.campbell.hyde@gmail.com

Writing Sample

The attached writing sample is a bench memo I drafted during a spring 2021 semester externship for Judge Haywood Gilliam on the Northern District of California. I was the only author of this memo, including its later redactions. Judge Gilliam approved the use of this redacted memo as a writing sample for clerkship applications.

I am particularly proud of this piece because in it I was able to persuade Judge Gilliam to reverse course on an issue of statutory construction, which had been decided contrarily in a prior order.

MEMORANDUM

TO: Haywood S. Gilliam, Jr.
 FROM: Blake Hyde
 DATE: April 23, 2021
 RE: [Redacted]

I. SUMMARY

Pending before the Court is [Defendant website's] motion to dismiss Plaintiff's Trafficking Victims Protection Reauthorization Act ("TVPRA") claims. I recommend denying the motion as to any conduct occurring after the 2008 TVPRA Amendments.

The Communications Decency Act ("CDA") grants [Defendant] immunity unless a plaintiff brings a "claim in a civil action brought under section 1595 of [the TVPRA], if the conduct underlying the claim constitutes a violation of section 1591 of that title." 47 U.S.C. § 230(e)(5)(A). The interplay between the TVPRA and CDA is ambiguous, resolution of which turns on *whose* conduct the CDA contemplates in the quoted phrase above—need it be Defendant's? I believe the correct interpretation is that the CDA immunity carve out requires that a *defendant*—not merely the primary trafficker—violate Section 1591, which is the TVPRA's sex trafficking provision. Below is an analysis of this doctrinal issue on which courts are split.

II. ANALYSIS

To raise a civil claim under Section 1595 of the TVPRA against [a party like Defendant], otherwise entitled to CDA immunity, Plaintiff must establish that "the conduct underlying the claim constitutes a violation of section 1591 of that title." 47 U.S.C. § 230(e)(5)(A). The question is *whose* conduct. Is it enough that Plaintiff's trafficker violated Section 1591 and that [Defendant] was merely negligent, per Section 1595, but did not participate knowingly, per Section 1591? Or must [Defendant] violate Section 1591 for Plaintiff to defeat CDA immunity?

Another way to frame the question is this: what part of Section 1595 is doing work under the immunity carve-out? Both Sections 1595 and 1591 provide beneficiary liability, but they differ with respect to 1) penalties, 2) the *mens rea* standard for the participation element, and 3) the range of human trafficking violations they cover. Section 1595 establishes 1) *civil* penalties for anyone who knowingly benefits from participation in a venture 2) which they *knew or should have known* was engaged in 3) a *human* trafficking violation—of which there are many—under the TVPRA. 18 U.S.C. § 1595(a). Section 1591 meanwhile establishes 1) *criminal* penalties for anyone who knowingly benefits from participation in a venture 2) which they *knew* was engaged in 3) *sex* trafficking specifically. 18 U.S.C. § 1591(a)(2). So, is Section 1595 providing the elements for the CDA immunity carve-out? Or is it merely a foothold for civil remedies against websites and must those websites instead violate Section 1591 in order to lose CDA immunity?

Courts disagree. *See Kik Interactive*, 482 F. Supp. 3d at 1251 (finding that Section 1591 establishes the relevant elements of a claim for Section 1595 civil damages against interactive computer services); *M.L.*, 2020 WL 5494903, at *5 (finding that Section 1595 establishes the relevant elements). Previously, the Court agreed with *M.L.*, holding that Plaintiff was required to plead the elements of Section 1595. Prior Order at 11-15.

But *Kik Interactive*'s approach has merit: First, it seems clear that Congress, in amending the CDA, sought only to allow a narrow exception to immunity for interactive computer services. In its Findings and Policy sections, the CDA praises the “extraordinary advance in the availability of educational and informational resources” online and the internet’s role as a “forum for a true diversity of public discourse.” 47 U.S.C. § 230(a)-(b). But the CDA also seeks “to ensure vigorous enforcement of Federal *criminal* laws to deter and punish trafficking.” *Id.* (emphasis added). In other words, Congress intended to protect free speech broadly but also

ensure that criminal violations did not go unpunished. It is reasonable to infer that Congress intended for Section 1591, a criminal provision with a higher *mens rea* standard, to provide the elements for a claim capable of defeating CDA immunity, rather than Section 1595.

Second, the CDA removes immunity for websites if “*the conduct*” underlying “*the claim*” is a violation of Section 1591. 47 U.S.C. § 230(e)(5)(A) (emphasis added). This seems to give primacy to the conduct of the parties in front of a court. The CDA is not removing immunity for some or someone’s conduct but *the* conduct being litigated. Here, Plaintiff’s claim is against [Defendant] not her traffickers. And it is [Defendant’s] conduct that is *the* conduct at issue.

Third, the CDA states that immunity shall have “no effect on sex trafficking law.” 230(e)(5). It is reasonable to infer that conduct that is not entitled to immunity is that which is outlined under the TVPRA’s sex trafficking provision, Section 1591, as opposed to its civil human trafficking provision, Section 1591.

Thus, a natural interpretation of Section 1595’s role in the CDA immunity carve-out is that it just provides civil remedies for sex trafficking victims. That said, it is still an important factor: if the CDA simply abrogated immunity for conduct constituting a violation of Section 1591, without tying the remedy for such a violation to Section 1595, parties like [Defendant] would be liable for criminal penalties. Punishment under Section 1591 is imprisonment for at least ten years. 18 U.S.C. § 1591(b). Given Congress’ intent to protect and encourage free speech, it is unlikely that it intended to leave [parties like Defendant] open to such liability. But it is also unlikely that it intended to leave them open to the more forgiving Section 1595, with its negligence *mens rea* standard, as opposed to Section 1591’s knowledge standard.

Therefore, to establish civil liability under Section 1595 for a party like [Defendant], Plaintiff must plead that [Defendant’s] conduct constituted a violation of Section 1591. To

establish beneficiary liability under Section 1591, Plaintiff must show that [Defendant] 1) knowingly benefited 2) from participation in a venture 3) which it knew constituted sex trafficking. 18 U.S.C. § 1591(a)(1)–(2).

A. Knowing benefit

This element is the same under Section 1591 as under Section 1595. Plaintiff need only establish that [Defendant] knew that it had received the benefit at issue. *See H.H. v. G6 Hospitality, LLC*, No. 2:19-CV-755, 2019 WL 6682152, at *2 (S.D. Ohio Dec. 6, 2019). [Relevant factual allegations redacted]. There is little doubt that [Defendant] knew it so benefited, regardless of whether it knew the source of the benefit. Thus, the first element is met.

B. Participation in a venture which Defendant knew constituted sex trafficking

Because Sections 1595 and 1591 have different *mens rea* elements, their preceding participation elements have been defined differently; as a result, the participation and *mens rea* elements are discussed here together. Because participation need only be negligent under Section 1595, courts have found that Plaintiff need only demonstrate “a continuous business relationship between the trafficker and the [defendant] such that it would appear that the trafficker and the [defendant] have established a pattern of conduct or could be said to have a tacit agreement.” *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 969 (S.D. Ohio 2019).

But Congress defined Section 1591’s participation element as “knowingly assisting, supporting, or facilitating” sex trafficking. 18 U.S.C. § 1591(e)(4). But such activity, according to at least one court, must be “participation in a sex-trafficking venture, not participation in other activities engaged in by the sex traffickers that do not further the sex-trafficking aspect of their venture.” *Geiss v. Weinstein Co. Holdings LLC*, 383 F. Supp. 3d 156, 169 (S.D.N.Y. 2019) (citation omitted). In other words, “there must be a causal relationship between affirmative

conduct furthering the sex-trafficking venture and receipt of a benefit.” *Id.* The question here, then, is whether Plaintiff and her trafficker provided benefit to [Defendant] *because* [Defendant] helped facilitate Plaintiff’s trafficking. Given Plaintiff and her trafficker’s goals in [utilizing Defendant’s services], it seems clear that, if [doing so] had not furthered the sex trafficking venture, Plaintiff and her trafficker would not have [provided the benefit at issue].

Still, mere but-for causation does not establish that [Defendant] participated in Plaintiff’s sex trafficking. Prior Order at 14. Neither does “mere negative acquiescence.” *U.S. v. Afyare*, 632 Fed. App’x. 272, 286 (6th Cir. 2016) (citation and internal quotation marks omitted). Section 1591 “targets those who participate in sex trafficking; it does not target [those] who turn a blind eye to the source of their financial sponsorship.” *Id.* Participation under Section 1591 must be “active.” *Id.* at 282. The Court previously found that Plaintiff had alleged only that [Defendant] knew sex trafficking was occurring and that this was insufficient to establish participation with sex traffickers. Prior Order at 14. If it were sufficient to establish participation, “[Defendant] would have a duty to [inspect every interaction with potential sex traffickers].” *Id.*

In her Amended Complaint, Plaintiff raises new factual allegations that [Defendant] did in fact [inspect every interaction with potential sex traffickers]. Regardless of whether [Defendant] had a duty to [inspect every interaction with potential sex traffickers], if it *did* do so, and still [engaged with likely sex traffickers], then it is reasonable to infer [Defendant’s] participation in sex trafficking. Additionally, Plaintiff claims [Defendant] took steps to maintain its relationship with sex traffickers. [Redacted]. These allegations seem sufficient to establish that [Defendant’s] participation with sex traffickers as not mere acquiescence.

[Defendant], meanwhile, argues that Plaintiff must show that [Defendant] participated with her trafficker specifically. Reply at 11. But as the Court stated previously, if a [party like

Defendant] “openly and knowingly makes a deal with sex traffickers . . . by [supporting sex traffickers] in exchange for a cut of the proceeds,” it should not be able to assert a defense simply because “it did not know in advance the names or identities of the particular people who would end up being predictably victimized.” Prior Order at 14 n.3. Such an outcome would be inconsistent with Congressional intent: requiring [Defendant] to know of a victim’s trafficker specifically would essentially negate the CDA’s already-narrow liability carve-out since it would be nearly impossible for sex trafficking victims [in this context] to clear such a hurdle.

On the other hand, Plaintiff contends that she is not required to establish that [Defendant] knew it was participating in sex trafficking since she believes Section 1595’s constructive knowledge is the standard. Opp. at 20. Plaintiff argues that [Defendant] itself need not have violated Section 1591 to be liable under Section 1595. *Id.* at 14. She claims that, for [Defendant] to be liable as a beneficiary under Section 1595, it is enough that *someone* (i.e. her sex trafficker) violated Section 1591. *Id.* But, again, I believe Plaintiff, to defeat CDA immunity, must establish that [Defendant] violated Section 1591, not just 1595, and therefore that Defendant knew the venture in which it was participating constituted sex trafficking. *See Kik Interactive*, 482 F. Supp. at 1251.

Although Plaintiff argues that she need not establish that [Defendant] knew about the relevant sex trafficking, Plaintiff also asserts that “it cannot be credibly argued that [Defendant] could not have known what was occurring.” Opp. at 25. I agree. To that end, Plaintiff alleges several supporting facts. [Redacted]. Based on these allegations, it seems highly likely that [Defendant] was aware of the sex trafficking [through its services]. Therefore, I think Plaintiff has adequately alleged the second and third elements as well.

Applicant Details

First Name	Katrina
Last Name	Jackson
Citizenship Status	U. S. Citizen
Email Address	kjackson3@law.gwu.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>460 L Street NW</div> <div>City</div> <div>Washington</div> <div>State/Territory</div> <div>District of Columbia</div> <div>Zip</div> <div>20001</div> </div> </div>
Contact Phone Number	973-534-1327

Applicant Education

BA/BS From	George Washington University
Date of BA/BS	May 2017
JD/LLB From	The George Washington University Law School
	https://www.law.gwu.edu/
Date of JD/LLB	May 16, 2021
Class Rank	50%
Law Review/Journal	Yes
Journal(s)	Federal Communications Law Journal
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	Yes

Specialized Work Experience

Professional Organization

Organizations

Just The Beginning Foundation

Recommenders

Nora, Fakhri

nora.fakhri@maryland.gov

Dimant, Maya

mayacdiment@gmail.com

Gavoor, Aram

agavoor@law.gwu.edu

917-562-9230

This applicant has certified that all data entered in this profile and any application documents are true and correct.

460 L Street NW., DC 20001
(973) 534-1327
Kjackson3@law.gwu.edu

April 25, 2022

The Honorable Judge John D. Bates
United States District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: 2022 term clerkship (or later)

Dear Judge Bates

I am writing to express my interest in serving as your Rules Law clerk beginning for the 2022 term. I am very interested in the operation and effect of the federal rules, and would like to expand upon my current understanding. Further, this position closely aligns with my professional goals as my background reflects my commitment to tackling systemic procedural legal issues.

In the fall of 2019, I served as a judicial intern at the U.S. District Court for the District of Columbia for the Honorable Judge Amit P. Mehta, where I attended hearings and conducted extensive legal research and writing. Additionally, I worked on a matter that was presented before the DC Circuit Court of Appeals and learned the analytic framework appellate court Judges take on matters before them.

Currently, I serve as a judicial law clerk to the Honorable Judge Robert A. Salerno at the Superior Court of the District of Columbia. As a law clerk at one of our nation's busiest trial courts, I am required to have exceptional organizational and analytical skills. I draft orders, review motions, and conduct daily legal research. Further, I have strengthened my ability to condense and succinctly explain a voluminous record, while efficiently dispatching a Petitioner's arguments in an analysis section.

Other experiences that have sharpened my ability to write and analyze include my role as Notes Editor on the Editorial Board of the Federal Communications Journal. I was selected to publish a case review in Volume 72.2 and my Note, *The Repeal of Net Neutrality: Does it Violate Title II of the Civil Rights Act of 1964?*, was published in Volume 73. Further, I was a Student Director at the DC Justice Lab. The DC Justice Lab is a criminal justice reform organization, and I and another law student drafted legislative language that called for higher Miranda Rights protections for the youth of the District of Columbia. The proposed language was adopted by Councilmember Robert C. White, Jr. and introduced as a Bill to amend Section 23-256 of the District of Columbia Code. This experience affirmed my devotion and commitment to pursuing a career in public service, and addressing procedural issues.

Thank you for your consideration. Please feel free to contact me with any additional questions.
Enclosed please find my resume, a writing sample, and my transcript.

Respectfully,

Katrina Jackson

Katrina Jackson

KATRINA JACKSON

460 L Street NW, Apt. 614 | Washington, DC 20001 | (973) 534-1327 | kjackson3@law.gwu.edu

EDUCATION

THE GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW	J.D. 2021	Washington, DC
GPA:	3.239/4.00	
Honors:	Shapiro Public Service Fellowship Recipient	
Activities:	Notes Editor, Federal Communications Law Journal, Federal Communications Bar Association – Law Student, Black Law Student Association – Social Action Chair, The National Black Law Students Association, Criminal Law Society – Social Justice Chair, SBA COVID-19 Commission	
Publications:	Katrina Jackson, Note, <i>The Repeal of Net Neutrality: Does it Violate Title II of the Civil Rights Act of 1964?</i> , 73 FED. COMM. L.J. 145, 147-73 (2020)	
Pro Bono:	Gold President’s Volunteer Service Award (completed over 500+ hours of pro bono service)	
THE GEORGE WASHINGTON UNIVERSITY	B.A. in International Affairs, 2017	Washington, DC
Activities:	Black Student Union, DC Reads Educational Tutor	
Study Abroad:	Autonomous University of Madrid, Spain – English Tutor (Fall 2017)	

CLERKSHIP

- **The Honorable Robert A. Salerno, Superior Court of the District of Columbia** 2021-2022

EXPERIENCE

MARYLAND OFFICE OF THE PUBLIC DEFENDER <i>Law Clerk, Post Conviction Defenders Division</i>	Baltimore, MD Jan 2021 – Apr 2021
<ul style="list-style-type: none"> Communicated with clients and discussed case-strategy and legal arguments. Conducted legal and factual research, drafted post-conviction motions to modify sentencing and ineffective assistance of counsel claims. 	
PUBLIC JUSTICE <i>Fall Law Clerk</i>	Washington, DC Aug 2020 – Dec 2020
<ul style="list-style-type: none"> Performed legal research, drafted sections of briefs, and provided argument support on several cases, including a class action lawsuit on behalf of individuals who have been wronged by for-profit probation companies and other private debt collectors. 	
THE GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW <i>Criminal Law & Policy Initiative Fellow, Professor Roger A. Fairfax, Jr.</i>	Washington, DC Jun 2020 – Apr 2020
<ul style="list-style-type: none"> Provided legal research and writing support against qualified immunity. 	
DC JUSTICE LAB <i>Student Director, Juvenile Justice</i>	Washington, DC Jun 2020 – Dec 2020
<ul style="list-style-type: none"> Testified before the DC Council, wrote memoranda, and drafted legislative language arguing for an increase in Miranda protections for minors. 	
THE PRISONER & REENTRY CLINIC <i>Student-Attorney, Jacob Burns Community Legal Clinic</i>	Washington, DC Jan 2020 – Apr 2020
<ul style="list-style-type: none"> Communicated with client, interviewed witnesses, and filed an expedited petition for a reduction in client’s minimum sentence before the U.S. Parole Commission. Client’s petition was ultimately granted, and client has been released. 	
U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA <i>Judicial Intern, Judge Amit P. Mehta Chambers</i>	Washington, DC Aug 2019 – Nov 2019
<ul style="list-style-type: none"> Conducted research and wrote sections of orders and opinions on civil, administrative, and criminal matters. 	
U.S. DEPARTMENT OF JUSTICE <i>Intern, United States Marshals Service</i>	Arlington, VA May 2019 – July 2019
<ul style="list-style-type: none"> Wrote administrative tort claims filed under the Federal Tort Claims Act. Conducted legal research and drafted memoranda on Giglio disclosure issues. 	

KATRINA JACKSON

460 L Street NW, Apt. 614 | Washington, DC 20001 | (973) 534-1327 | kjackson3@law.gwu.edu

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Intern, Educational Projects Opportunity

Washington, DC

Sept 2017 – Dec 2017

- Developed an in-house multistate database for undocumented families in the wake of Hurricane Harvey and Irma on requisite school enrollment documents.

ADDITIONAL INFORMATION

Language Skills: Spanish - Advanced proficiency.

Interests: Gymnastics, Oceanography.

BAR MEMBERSHIP

- District of Columbia, admitted January 2022.
-

Official Academic Transcript from:
THE GEORGE WASHINGTON UNIVERSITY
OFFICE OF THE REGISTRAR
800 21ST STREET NW
WASHINGTON, DC 20052

TELEPHONE: 202-994-4900

Official Academic Transcript of:
KATRINA JACKSON
Transcript Created: 4-Aug-2021

Requested by:
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WASHINGTON, DC 20001-2557

E-Mail: kjackson3@law.gwu.edu



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THE GEORGE WASHINGTON UNIVERSITY

OFFICE OF THE REGISTRAR

WASHINGTON, DC

GWid: G43151864
Date of Birth: 28-OCT

Date Issued: 04-AUG-2021

Record of: Katrina Jennifer Jackson

Page: 1

Student Level: Law
Admit Term: Fall 2018

Issued To: KATRINA JACKSON
460 L STREET NW
APT. 614
WASHINGTON, DC 20001-2557

Current College(s): Law School
Current Major(s): Law

Degree Awarded: J D 16-MAY-2021
Major: Law

Degree Awarded: Bachelor of Arts 21-MAY-2017
Major: International Affairs
Area of Concentration: Security Policy

EXPERIENTIAL REQUIREMENT MET
WRITING REQUIREMENT MET (6413)

SUBJ NO COURSE TITLE CRDT GRD PTS

GEORGE WASHINGTON UNIVERSITY CREDIT:

Fall 2018

Law School
Law

LAW 6202 Contracts I 3.00 B

LAW 6206 Wilmarth Torts 4.00 B-

LAW 6210 Suter Criminal Law 3.00 B+

LAW 6212 Cottrol Civil Procedure I 3.00 B+

LAW 6216 Smith Legal Research And 2.00 A

Writing

Myers-Mutschall

Ehrs 15.00 GPA-Hrs 15.00 GPA 3.178

CUM 15.00 GPA-Hrs 15.00 GPA 3.178

Spring 2019

Law School

Law

LAW 6203 Contracts II 3.00 B

LAW 6208 Wilmarth Property 4.00 B-

LAW 6213 Tuttle Civil Procedure II 3.00 B

LAW 6214 Siegel Constitutional Law I 3.00 B+

LAW 6217 Morrison Introduction To Advocacy 2.00 B

Myers-Mutschall

Ehrs 15.00 GPA-Hrs 15.00 GPA 3.022

CUM 30.00 GPA-Hrs 30.00 GPA 3.100

Good Standing

CONTINUED ON NEXT COLUMN *****

SUBJ NO COURSE TITLE CRDT GRD PTS

Fall 2019

Law School
Law

LAW 6232 Federal Courts 3.00 B+

Stucky

LAW 6387 Voting Rights Law 2.00 B+

Pershing

LAW 6400 Administrative Law 3.00 A-

Gavoor

LAW 6414 Telecommunications Law 2.00 A

Lucarelli

LAW 6657 Fed Communication Law 1.00 CR

Jrl Note

LAW 6668 Field Placement 2.00 CR

Tillipman

LAW 6669 The Craft Of Judging 2.00 B+

Canan

Ehrs 15.00 GPA-Hrs 12.00 GPA 3.528

CUM 45.00 GPA-Hrs 42.00 GPA 3.222

Good Standing

Spring 2020

LAW 6250 Corporations 4.00 CR

Fairfax

LAW 6360 Criminal Procedure 3.00 CR

Lee

LAW 6362 Adjudicatory Criminal 2.00 CR

Pro.

Sulton

LAW 6623 Prisoner And Reentry 6.00 CR

Clinic

LAW 6657 Steinberg Fed Communication Law 1.00 CR

Jrl Note

Ehrs 16.00 GPA-Hrs 0.00 GPA 0.000

CUM 61.00 GPA-Hrs 42.00 GPA 3.222

Good Standing

DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION. ALL LAW SCHOOL COURSES FOR SPRING 2020 SEMESTER WERE GRADED ON A MANDATORY CREDIT/NO-CREDIT BASIS.

Summer 2020

LAW 6640 Trial Advocacy 3.00 A

Gilligan

LAW 6646 Mediation 2.00 A

Craig

Ehrs 5.00 GPA-Hrs 5.00 GPA 4.000

CUM 66.00 GPA-Hrs 47.00 GPA 3.305

CONTINUED ON PAGE 2 *****



Edmundson
University Registrar

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

"A" * "TH" "Rk" "TRA"

GWid G43151864
Date of Birth: 28 OCT

Date Issued: 04 AUG 2021

Record of: Katrina Jennifer Jackson

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
Fall 2020				
LAW 6230	Evidence	4.00	B+	
LAW 6266	Saltzburg Labor Law	3.00	B	
LAW 6378	Craver Selected Topics In Crim. Law	2.00	B+	
LAW 6380	Braman Constitutional Law II	4.00	B	
LAW 6413	Smith Federal Communications Law Jrn	1.00	CR	
LAW 6667	Advanced Field Placement	0.00	CR	
LAW 6668	Field Placement	2.00	CR	
Ehrs 16.00 GPA Hrs 13.00 GPA 3.077				
CUM 82.00 GPA Hrs 60.00 GPA 3.256				
Good Standing				
Spring 2021				
LAW 6218	Professional Responslbty/Ethic Tuttle	2.00	B	
LAW 6348	Ross Family Law	4.00	B	
LAW 6384	Peterson Law Of Separation Of Powers	3.00	B+	
LAW 6413	Law Jrn Federal Communications	1.00	CR	
LAW 6617	Suter Law And Medicine	3.00	CR	
LAW 6882	Bartee Robertson Foreign Intel Surv Act	2.00	B+	
Ehrs 15.00 GPA Hrs 11.00 GPA 3.152				
CUM 97.00 GPA Hrs 71.00 GPA 3.239				
Good Standing				
r r r	r r	TRANSCRIPT TOTALS	r r	r r r r
Earned Hrs GPA Hrs Points GPA				
TOTAL INSTITUTION	97.00	71.00	230.00	3.239
OVERALL	97.00	71.00	230.00	3.239



Edmundson
University Registrar

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THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

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EXPLANATION OF COURSE NUMBERINGSYSTEM

All colleges and schools beginning Fall 2010 semester:

- 1000 to 1999 Primarily introductory undergraduate courses.
- 2000 to 4999 Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
- 5000 to 5999 Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
- 6000 to 6999 For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
- 8000 to 8999 For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

- 001 to 100 Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
- 101 to 200 Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
- 201 to 300 Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
- 301 to 400 Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
- 700s The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
- 801 This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

- 100 to 200 Required courses for first-year students.
- 201 to 300 Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
- 301 to 400 Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

- 201 to 299 Required courses for J.D. candidates.
- 300 to 499 Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
- 500 to 850 Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and

School of Public Health and Health Services before Fall 2010 semester:

- 001 to 200 Designed for students in undergraduate programs.
- 201 to 800 Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit <http://go.gwu.edu/corcorantranscriptkey>

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
CU	Catholic University of America	NVCC	Northern Virginia Community College
GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; B, Good; C, Satisfactory; D, Low Pass; F, Fail; I, Incomplete; IPG, In Progress; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; P, Pass; NP, No Pass; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the I is replaced by the final grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.

Effective Fall 2003: The grading symbol R indicates need to repeat course.

Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I/ and the grade.

Effective Fall 1987: The following grading symbols were added: A-, B+, B-, C+, C-, D+, D-.

Effective Summer 1980: The grading symbols: P, Pass, and NP, No Pass, replace CR, Credit, and NC, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) A, Excellent; B, Good; C, Minimum Pass; F, Failure; I, Incomplete; IPG, In Progress; CR, Credit; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 1994: The following grading symbols were added: A-, B+, B-, C+, C- grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; B+, B, B-, Good; C+, C, C-, Passing; D, Minimum Pass; F, Failure; CR, Credit; NC, No Credit; I, Incomplete. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

M.D. Program Grading System

H, Honors; HP, High Pass; P, Pass; F, Failure; IP, In Progress; I, Incomplete; CN, Conditional; W, Withdrawal; X, Exempt, CN/P, Conditional converted to Pass; CN/F, Conditional converted to Failure. Through Summer 2014 the I was replaced with I and the final grade.

For historical information not included in the transcript key, please visit

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April 25, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am writing to recommend Katrina Jackson for a judicial clerkship in your chambers. I had the pleasure of supervising Katrina's work with the Post Conviction Defenders Division of the Maryland Office of the Public Defender.

Katrina joined our office for the spring semester of 2021. Although her internship was entirely remote, she was completely engaged and dedicated to her work at our office. Beginning with her interview and throughout her internship, Katrina was pleasant and professional.

Throughout the semester, Katrina displayed her strong legal research ability, working with multiple attorneys on varied projects. She worked on post conviction petitions for four different attorneys, drafting full sections and even full petitions. She also wrote memoranda for both attorneys and clients. Katrina is a thorough legal researcher. She was able to identify and apply both controlling and persuasive authority appropriately. Katrina also has excellent time management skills and was cognizant of deadlines. In one of my cases with a tight deadline, she researched and drafted a section of a post conviction petition with little guidance. However, when she had more time to work through cases with attorneys, she asked appropriate questions and implemented feedback.

Katrina always displayed her interest in learning more about the law and our work. She no doubt developed professionally as a result of the many internships she sought out throughout law school before coming to the Post Conviction Defenders Division. I am confident that, with her dedication to her work and to learning, she will only continue to improve while completing her current clerkship.

Sincerely,

Nora Fakhri
Assistant Public Defender
Maryland Office of the Public Defender
(410) 209-8632
nora.fakhri@maryland.gov

Fakhri Nora - nora.fakhri@maryland.gov

The George Washington University Law School
2000 H St NW
Washington, DC 20052

April 26, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I write to recommend Katrina Jackson for a clerkship in your chambers. Through my work with Katrina in the Prisoner and Reentry Clinic ("PARC") at The George Washington University Law School, I observed firsthand her commitment to thorough and client-focused lawyering.

When I met Katrina, I was a Visiting Associate Professor in PARC. PARC represents clients in post-conviction matters. The clinic works with people facing legal barriers and collateral consequences as a result of their criminal records. I also co-taught a weekly seminar for skills training and contextual learning and support for students enrolled in PARC. Students in PARC interview and counsel clients, complete legal research, develop factual and legal theories, plan their cases, and conduct oral and written advocacy.

I met Katrina in the fall of 2020 when I was her supervisor in PARC. She stood out among her peers as pensive and dedicated. Over the course of the semester, she worked with a partner to represent a man who had been convicted of murder to reduce his minimum sentence and make him eligible for parole. She took the time to get to know his family and community, interviewing several people to ensure she was able to present a nuanced portrait of her client. Her partner remarked on Katrina's impressive and unique storytelling ability to ensure that their client advocacy was personal and persuasive. Katrina was also thoughtful about different strategic choices to most benefit her client. When a FOIA request on behalf of her client was denied, she wrote an appeal of that decision, leveraging case law and policy to persuasively argue her point.

Throughout the semester, Katrina was engaged and diligent. She asked questions when necessary and took direction well. When COVID-19 presented additional challenges for her client, she was able to expedite the petition and sent it weeks earlier than expected, upholding the quality and integrity of her work. Moreover, her client was eventually released, based in large part upon the work Katrina did to lay a strong foundation of persuasive facts and evidence.

Katrina aspires to be a civil rights lawyer, and has enjoyed her experience clerking at the D.C. Superior Court. Her combination of appreciation for learning, warmth, openness, and work ethic would make her a wonderful addition to your chambers. Please feel free to contact me if I can provide any more information regarding Katrina's candidacy.

Best,

Maya Dimant
(773)-614-7513
mayacdiant@gmail.com

Maya Dimant - mayacdiant@gmail.com

The George Washington University Law School
2000 H St NW
Washington, DC 20052

April 25, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am writing to enthusiastically recommend Katrina Jackson for a clerkship in your chambers. Katrina's intellect, passion for the law, work ethic, and poise make her a top tier candidate.

I was Katrina's Administrative Law professor at The George Washington University Law School. Despite being one of the most difficult course offerings at the university due to the breadth and complexity of the subject-matter, Katrina excelled. She sat front and center, and asked refined questions that were premised on an underlying comprehension of the readings. She provided thoughtful and correct answers to my Socratic questioning. I was impressed with her exam performance, which earned her a grade of A- in the course.

In my conversations with Katrina, I have encouraged her to clerk. She is genuinely interested in the law and the judicial experience. Her legal training as a research assistant and her internship experiences in all three branches of the federal government have fostered in her an unusually strong ability to read and apply statutory schemes in practical settings. Her work ethic is evinced by her role as a student-attorney in our law school's Prisoner & Reentry Clinic. I believe that your investment in her as a law clerk would yield splendid results in terms of her timely and thoughtful contributions to your legal research and writing needs.

Katrina has the temperament to capably serve as a clerk. She is humble, yet assertive. She is thoughtful, yet timely in her responsiveness. Most importantly, she is mature and exercises sound judgment with minimal need of supervision. If you have any questions about or would like to discuss my unreserved recommendation of Katrina, please do not hesitate to contact me at (917) 562-9230 or at agavoor@law.gwu.edu.

Sincerely,

Aram A. Gavoor
Professorial Lecturer of Law

Aram Gavoor - agavoor@law.gwu.edu - 917-562-9230

WRITING SAMPLE

**Katrina Jackson
460 L Street NW,
Washington, DC 20001**

The enclosed writing sample is an excerpt from a Post-Conviction Motion I drafted at the Maryland Office of the Public Defender.

SUPPLEMENTAL PETITION FOR POST CONVICTION RELIEF

ISSUES¹

1. Trial Counsel rendered ineffective assistance by failing to investigate or call an expert witness to testify to the difficulties of eyewitness identification.
2. Trial Counsel rendered ineffective assistance by failing to procure a jury instruction on cross-racial identification.
3. Trial Counsel rendered ineffective assistance by failing to give notice of the intent to admit a business record including Mr. X's photograph, height, and weight.
4. Trial Counsel rendered ineffective assistance by failing to move to admit the materials counsel attempted to use during closing argument.

As relief on these claims, Mr. X requests a new trial.

FACTS AND PROCEDURAL HISTORY

Removed

APPLICABLE LAW

1. Ineffective assistance of counsel, generally

Mr. X was entitled to effective assistance from his counsel.³ In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-pronged test to

³ See U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence”); Maryland Declaration of Rights, art. 21 (“[I]n all criminal prosecutions, every man hath a right . . . to be

assess effective assistance: “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To satisfy the first prong, a defendant “must show that counsel’s representation fell below an objective standard of reasonableness . . . under prevailing professional norms.” *Id.* at 688. To satisfy the second prong, a defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. Thus, the prejudice analysis “should not focus solely on an outcome determination, but should consider whether the result of the proceeding was fundamentally unfair or unreliable.” *Coleman v. State*, 434 Md. 320, 341 (2013) (internal quotation marks omitted).

In Maryland, a “reasonable probability” means “a substantial or significant possibility that the verdict of the trier of fact would have been affected.” *Bowers v. State*, 320 Md. 416, 427 (1990). Errors that do not merit reversal on their own may still warrant reversal through their “cumulative effect.” *Id.* “[T]he prejudicial effect of counsel’s deficient performance need not meet a preponderance of the evidence standard.” *Id.* at 425.

2. Waiver

Mr. X has not waived his ineffective assistance of counsel claims. The Court of Appeals “ha[s] explained on numerous occasions that a post-conviction

allowed counsel”). *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

proceeding pursuant to the Maryland Uniform Post Conviction Procedure Act . . . is the most appropriate way to raise the claim of ineffective assistance of counsel.” *Mosley v. State*, 378 Md. 548, 558-59 (2003).

ARGUMENT

1. Counsel rendered ineffective assistance by failing to investigate or call an expert witness to testify to the difficulties of eyewitness identification.

a. The dangers of eyewitness identification

In *United States v. Wade*, the Supreme Court recognized the innumerable dangers surrounding eyewitness identification, stating that “[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” *United States v. Wade*, 388 U.S. 218, 228 (1967). Indeed, “there is a general consensus that misidentification is the single greatest cause of wrongful convictions in this country.” *Small v. State*, 464 Md. 68, 105 (Barbera, C.J., concurring). According to an International Association of Chiefs of Police publication, “[o]f all investigative procedures employed by the police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work.” *Id.* (internal quotation marks omitted).

The Court of Appeals of Maryland has long recognized the substantial body of research displaying the fallibility of cross-racial identifications in particular. *See Smith v. State*, 388 Md. 468, 478-86 (2005). “[A] cross-racial identification occurs when an eyewitness of one race is asked to identify a particular individual of another race.” *Id.* at

478. Laboratory and field studies display that “some witnesses are better able to identify members of their own race, but are significantly impaired when attempting to identify individuals of another race.” *Id.* at 478-79. Many studies show that this “effect is strongest when white participants attempt to recognize black faces.” *Id.* at 480. There is disagreement, however, “on whether cross-racial impairment affects all races,” as some studies have suggested that Black eyewitnesses do not have difficulties identifying individuals of other races. *Id.*

b. Expert testimony on eyewitness identification would have been of real, appreciable help to the jury in this case.

The Court of Appeals has noted that it “appreciates that scientific advances have revealed (and may continue to reveal) a novel or greater understanding of the mechanics of memory that may not be intuitive to a layperson. Thus, it is time to make clear that trial courts should recognize these scientific advances in exercising their discretion whether to admit such expert testimony in a particular case.” *Bomas v. State*, 412 Md. 392, 416 (2010). Expert testimony on the difficulties of eyewitness identification is admissible when it “will be of real appreciable help to the trier of fact in deciding the issue presented.” *Id.*

In this case, expert testimony would have been of help to the jury. “[S]ome of the factors of eyewitness identification are not beyond the ken of jurors. For example, the effects of stress or time are generally known to exacerbate memory loss and, barring a specific set of facts, do not require expert testimony for the layperson to understand them in the context of eyewitness testimony.” *Id.*

The nuanced difficulties of cross-racial identification are not readily apparent to a lay jury. *See United States v. Nolan*, 956 F.3d 71, 82 (2d Cir. 2020) (noting that it is “unlikely” that jurors typically understand the difficulties of perceiving and remembering fine facial features of someone of another race).

A lay juror may think, as the State argued, that concerns about cross-racial identification are overblown. *See* Tr. II at 133. A lay juror would be surprised to hear that the cross-racial effect is more prevalent among white subjects trying to identify people of other races, as was the case here. *See Smith*, 388 Md. at 478-80 (citing studies displaying that white subjects were more likely to provide inaccurate cross-racial identifications than Black subjects).

Expert testimony regarding other concerning facts surrounding the identification would have been helpful to the jury as well. For example, a long day of drinking or serious intoxication is “generally known to exacerbate memory loss.” *See Bombas*, 412 Md. at 416. However, an expert witness could have helped the jury understand the perhaps less obvious effects that a smaller amount of alcohol and a long night out after a day of work could have on the memory.

Accordingly, expert testimony regarding the difficulties of eyewitness identification was appropriate in this case.

c. Counsel rendered deficient performance by failing to call an expert on eyewitness identification.

In this case, counsel’s failure to call an expert witness to discuss the fallibility of eyewitness identification amounted to deficient performance. There was no question that

the crime in this case had occurred. Thus, Trial Counsel's strategy was to argue that Ms. Z had misidentified Mr. X. In making this argument, counsel noted that the circumstances of the identification—including that Ms. Z had been drinking and that it was a cross-racial identification—rendered the identification unreliable. Tr. II at 123-26.

Based upon counsel's trial strategy and the facts of the case, it was deficient performance not to investigate or call an expert witness on the difficulties of eyewitness identification. In *Peterson*, the Court of Special Appeals concluded that trial counsel had rendered deficient performance by failing to provide expert testimony to support his theory of imperfect self-defense due to battered spouse syndrome. *State v. Peterson*, 158 Md. App. 558, 597 (2004). This was a novel defense in Maryland at that time. *Id.* at 577, 586-87. Trial counsel in *Peterson* consulted with but then declined to call an expert on battered spouse syndrome. *Id.* at 577. Trial counsel requested a jury instruction on imperfect self-defense, but the court concluded that it had not been generated by the evidence. *Id.* at 566. Trial counsel testified at the post-conviction hearing that he had made a strategic decision to use imperfect self-defense as a secondary defense and not to call the expert witness. *Id.* at 580-81. The court concluded that, because the expert testimony was crucial to the secondary defense, it was unreasonable for trial counsel not to present it. *Id.* at 596-97; compare *Fullwood v. State*, 234 Md. App. 57, 68-70 (2017) (concluding that counsel had not performed deficiently in failing to call an expert witness regarding the specifics of the crime where the petitioner had not shown that counsel's

strategy of “focus[ing] on who committed the crime, rather than the particulars of the crime itself” was unreasonable).

The Second Circuit Court of Appeals recently found ineffective assistance where an attorney failed to consult or call an expert on eyewitness identification in a cross-racial identification case. Noting Second Circuit case law stating that “*Strickland* ordinarily does not require defense counsel to call any particular witness,” the court explained that in that case, like in Mr. X’s case:

the eyewitness testimony was sufficiently unreliable in ways not readily apparent to a lay jury. For example, . . . persons of a given race or color are not nearly as good at perceiving and remembering the fine facial features of someone of a different race or color as they are at perceiving such features of someone of their own race or color. But it appears to us unlikely that this is common knowledge among typical jurors.

United States v. Nolan, 956 F.3d 71, 81-82 (2d Cir. 2020). The court concluded that, in that circumstance, counsel “had a duty to at least consult an expert and consider whether to call her to the stand.” *Id.* at 82.

Trial Counsel had the same duty in this case. Mr. X does not argue that there is a bright-line rule that counsel must call an expert witness anytime there is a cross-racial identification. However, under the very specific circumstances of this case, counsel had a duty to do so. Ms. Z’s identification was unreliable for many reasons: it did not match her initial size description, she made no previous mention of Mr. X’s facial scar, she had been drinking, she encountered the attacker in a stressful situation, the attack occurred at night, the attack lasted only two minutes or less, the identification occurred months after the attack, and it was a cross-racial identification. Trial counsel’s

entire theory of the case was that Ms. Z's identification was wrong, and trial counsel wanted to argue that it was unreliable, in part, because it was a cross-racial identification. Trial counsel wanted the jury to be instructed on the fallibility of cross-racial identification. In this case, under these specific facts, it was unreasonable for counsel to fail to investigate and call an expert on eyewitness identifications.

d. Counsel's deficiency prejudiced Mr. X.

Had counsel presented expert testimony regarding the difficulties of cross-racial identification, there is a reasonable probability that the outcome of Mr. X's trial would have been different. First, like in *Peterson*, had counsel presented expert testimony on cross-racial identification, the jury instruction on the topic would have been generated.

Furthermore, in the absence of the expert testimony, the State was able to paint Trial Counsel's argument on the difficulty of cross-racial identifications as a mere "distraction." Tr. II at 133. The State argued that "[t]he Defense would have you believe that a black victim, a woman or a female, was robbed or assaulted, that they would have—that it would be impossible for them to identify a white suspect." *Id.* Although this line of reasoning may seem intuitive to a juror, it is an inaccurate representation of the science on cross-racial identifications, as an expert would have explained. *See Smith*, 388 Md. at 478-80 (citing studies displaying that white subjects were more likely to provide inaccurate cross-racial identifications than Black subjects).

The State also argued that people also have difficulty making intra-racial identifications. Tr. II at 133. Again, an expert would have been able to explain that, while it is true that *all* eyewitness identifications should be questioned, studies have shown that

cross-racial identifications are even more concerning. *See Smith*, 388 Md. at 478-80. The State construed Trial Counsel's concerns about cross-racial identification as a "distraction," claiming that Trial Counsel was trying to convince the jury that accurate cross-racial identifications were impossible. An expert would have helped the jury understand that, while an accurate cross-racial identification is possible, there is a valid, scientifically-based reason to be skeptical of cross-racial identifications. These nuances—which the State was able to exploit in the absence of expert testimony—are precisely what the jury needed an expert witness to help them understand. An expert witness would have helped the jury understand just how unreliable Ms. Z's identification was.

Finally Ms. Z's identification of Mr. X was the only evidence that Mr. X was the assailant in this case. Crucially, there was a video of a person using the stolen credit card, wearing clothing that matched the attacker's. Both the court and a juror suggested that the person in the video did not appear to be Mr. X. Tr. I at 230; Tr. IV at 15-16.

Ms. Z's identification in this case was problematic for many reasons. An expert witness would have helped the jury understand "the vagaries of eyewitness identification," *Wade*, 388 U.S. at 228, and prevented the State from downplaying those concerns. Because counsel's failure to investigate or call an expert in eyewitness identification prejudiced Mr. X, Mr. X is entitled to a new trial.

2. Counsel rendered ineffective assistance by failing to procure a jury instruction on cross-racial identification.

Counsel requested a jury instruction regarding the fallibility of cross-racial identification. A trial court is required to give a requested jury instruction when: “(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.” *Dickey v. State*, 404 Md. 187, 197-97 (2008). In this case, the trial court concluded, and the Court of Special Appeals affirmed, that Trial Counsel had not generated the instruction and, therefore, that it was not applicable to the facts of the case. Tr. II at 69-71; X, 2018 WL 2938321 at *2-7.⁴

⁴ The Court of Special Appeals also noted that Trial Counsel’s proposed instruction was not an accurate statement of the law. X, 2018 WL 2938321 at *6. To the extent that the instruction could have been denied for this reason, counsel rendered ineffective assistance by failing to provide a legally correct jury instruction. However, “where a requested instruction is technically erroneous, but the subject is one in which the court is required to give an instruction, it is the duty of the trial court to include a correct instruction.” *Dickey*, 404 Md. at 198 n.5. See, for example, the American Bar Association’s recommended instruction on cross-racial identification:

In this case, the identifying witness is of a different race than the defendant. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race. You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. [For example, you may conclude that the witness had sufficient contacts with members of the defendant's race that [he] [she] would not have greater difficulty in making a reliable identification.]

In denying the instruction, the trial court stated: “You didn’t ask Ms. Z any questions concerning her ability to make cross-racial identifications as is—as was done on the *Tucker* case.” Tr. II at 69. The court noted that the witness in *Tucker* had been asked about her confidence in her ability to make cross-racial identifications and about the racial diversity of her neighborhood. *Id.* at 70. The court stated that Trial Counsel “didn’t go into any of that with” Ms. Z, although she “very well could have.” *Id.*

a. Counsel rendered deficient performance by failing to give rise to the cross-racial identification jury instruction.

Counsel clearly intended to procure the jury instruction and argued the difficulties of cross-racial identification as an important part of the defense theory at trial. It was not reasonable trial strategy to forego the instruction.

Perhaps counsel did not realize that it was necessary to present evidence to give rise to the instruction. If so, this Court should find deficient performance. *See Coleman v. State*, 434 Md. 320, 338 (2013) (“We do not see how trial counsel’s failure to object because of his ignorance of the law could possibly be seen as sound trial strategy or a strategic choice.”). As the trial court noted, *Tucker* provides the types of questions that could be asked on cross-examination to give rise to the instruction. Tr. II at 69-71.

If counsel simply did not think to ask questions to give rise to the instruction, her non-decision also cannot be considered tactical. *See State v. Smith*, 223 Md. App. 16, 40 (2015) (rejecting the State’s argument that trial counsel “had a sound and tactical reason” when trial counsel did not recollect any tactical reason); *State v. Borchardt*, 396 Md. 586,

American Bar Association, *American Bar Association Policy 104D: Cross-Racial Identification*, 37 Sw. U.L. Rev. 917 (2008).

604 (2007) (“Before deciding to act, or not to act, counsel must make a rational and informed decision on strategy and tactics based upon adequate investigation and preparation.”). Even where trial counsel asserts a strategy, a reviewing court must still consider “whether [those] particular strategic choices are reasonable.” *Strickland*, 466 U.S. at 681.

In this case, counsel requested a cross-racial identification jury instruction, and there was no strategic reason not to give rise to that instruction. As the trial court noted, counsel could have done so by asking Ms. Z about her confidence in her ability to make a cross-racial identification or about the racial diversity of her neighborhood. Tr. II at 70; *see Tucker*, 407 Md. at 374. Whatever her answers, they would have been helpful and would have generated the need for the instruction.⁵ In this case, Ms. Z lived in Fells Point. She likely would have answered that her neighborhood was mostly white.⁶ If she had testified that she felt her neighborhood was diverse, a jury of her fellow Baltimoreans would have questioned her accuracy. Either answer would have supported Trial Counsel’s theory and given rise to the jury instruction. Even if Ms. Z had testified that she was confident in her ability to make a cross-racial identification, the jury would then have been instructed on the difficulties of making such an identification, similarly rendering the basis of her confidence in her identification questionable. Trial

⁵ In *Tucker*, the witness answered that many of her neighbors were African American. *Tucker*, 407 Md. at 374 n.3.

⁶ Data from 2011 to 2015 shows that, while Baltimore is around 60% Black, Fells Point is less than 6% Black. Fells Point is approximately 80% white. BALTIMORE CITY HEALTH DEPT., FELLS POINT NEIGHBORHOOD HEALTH PROFILE at 7 (2017), *available at*, [https://health.baltimorecity.gov/sites/default/files/NHP%202017%20-%202016%20Fells%20Point%20\(rev%206-9-17\).pdf](https://health.baltimorecity.gov/sites/default/files/NHP%202017%20-%202016%20Fells%20Point%20(rev%206-9-17).pdf).

Counsel's failure to generate the instruction cannot be attributed to reasonable trial strategy.

b. Trial Counsel's failure to give rise to the jury instruction prejudiced Mr. X.

This deficiency prejudiced Mr. X. It is true that counsel was able to argue inclosing that cross-racial identification is difficult, “[b]ut argument by counsel to the jury will naturally be imbued with a greater gravitas when it is supported by a[n] instruction on the same point issued from the bench.” *Cost v. State*, 417 Md. 360, 381 (2010).

In this case, there is more than a reasonable probability that, had counsel asked the questions necessary to secure the jury instruction, the outcome of the case would have been different. Both the court and a juror expressed skepticism that Mr. X was the person in the gas station surveillance footage—the person who appeared to match Ms. Z's description of the attacker and who had used Ms. Y's stolen credit card. *See* Tr. I at 230; Tr. IV at 15-16. Mr. X simply did not match the description Ms. Z gave of a 5'11, 180 to 200 pound man. She made the identification months after the crime, having seen the attacker for only up to a couple of minutes, in the dark of night, after a long evening out, during a traumatic event.

A jury instruction on the difficulties of cross-racial identification would also have severely undercut the State's argument that the idea that cross-racial identification is difficult was a “distraction” and that cross-racial identifications are no more difficult than intraracial identifications. *See* Tr. II at 133. The instruction would have dealt a fatal blow to the veracity of Ms. Z's identification of Mr. X. The instruction would not

only have encouraged the jury to consider the veracity of Ms. Z's identification in a new light; it would also have give counsel's arguments regarding the serious concerns surrounding cross-racial identification the gravitas of having been highlighted by the court. *See Cost*, 417 Md. at 381. Accordingly, both *Strickland* prongs are met, and Mr. X is entitled to a new trial.

3. Trial Counsel rendered ineffective assistance by failing to give notice of the intent to admit a business record including Mr. X's photograph, height, and weight.

Trial counsel stated the intent to move to admit a business record from the Department of Public Safety and Correctional Services, including Mr. X's booking photograph of August 16, 2016, as well as his height and weight. Tr. II at 58. The business record was not admitted because Trial Counsel had failed to give ten days' notice of the intent to offer the record. Tr. II at 59-61.

a. Counsel rendered deficient performance by failing to give timely notice of the intent to introduce the business record at trial.

Counsel rendered deficient performance by failing to give timely notice of the intent to move to admit a business record. Whether counsel did not know of the 10-day requirement or merely missed it, this cannot be attributed to strategy. This belated filing was an error that amounted to deficient performance.

b. Counsel's failure to give timely notice of the business record prejudiced Mr. X.

Mr. X's booking information would have shown that he was approximately 5'8 and 150 pounds in August 2016. Counsel argued at length that Mr. X was much smaller than the assailant. Unable to use the evidence counsel had attempted to

admit, counsel was left to call Mr. X into the well to display his size for the jury. Tr. II at 120. The jurors, however, were left with questions about Mr. X's size and asked to see Mr. X's legs during deliberations, but were not allowed. Tr. II at 166.

The jury's question clearly displays that, had the jury been aware that Mr. X was significantly smaller than the assailant was described to be, or seemed to be from the surveillance footage, there is at least a significant possibility that at least one juror would have refused to convict Mr. X. *See Bowers*, 320 Md. at 427.

Accordingly, both *Strickland* prongs are met, and this Court must grant Mr. X's Motion for a new trial.

Applicant Details

First Name	Christopher		
Middle Initial	A		
Last Name	Jannace		
Citizenship Status	U. S. Citizen		
Email Address	chrisjannace@gmail.com		
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Contact Phone Number	6262610875		
Other Phone Number	9109732084		

Applicant Education

BA/BS From	United States Military Academy at West Point
Date of BA/BS	May 2005
JD/LLB From	American University, Washington College of Law
	http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010
Date of JD/LLB	May 23, 2021
Class Rank	20%
Law Review/Journal	Yes
Journal(s)	Business Law Review
Moot Court Experience	Yes
Moot Court Name(s)	Alternative Dispute Resolution Honor Society

Bar Admission

Admission(s) **District of Columbia**

Prior Judicial Experience

Judicial
Internships/ **No**
Externships
Post-graduate
Judicial Law **Yes**
Clerk

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

CHRISTOPHER A. JANNACE

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May 14, 2022

The Honorable John M. Bates
United States District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Bates,

I am writing to apply for your September 2024 term clerkship. I am an attorney advisor to the Honorable Michael G. Young, administrative law judge with the Federal Mine Safety and Health Review Commission, for a two-year term through August 2023.

As an aspiring litigator with federal agency experience, I believe I would make a strong addition to your chambers. My experience reflects a commitment to public service, team leadership, and constant professional development, particularly in legal research and writing, that make me an effective judicial clerk and team member. Preparedness begets confidence; I am composed in oral and written advocacy because I methodically prepare each issue.

In Army Special Forces, I managed projects, coordinated multi-agency actions, and negotiated with foreign entities. I took these skills into a technical sales job where I was also made a product manager, coordinating interdepartmental efforts in production, engineering, and training. In law school, I was a Research and Writing Fellow, developing students and reinforcing my skills by teaching. I excelled in trial and appellate advocacy courses, honing an ability to prepare motions and bench memoranda. I worked at the Department of Justice and Federal Energy Regulatory Commission quickly learning all pertinent law, drafting litigation and rulemaking documents, and providing analysis on job-specific and administrative law.

I am well-versed in judicial decision writing, adapting to judicial philosophy and writing style, and preparing pre- and post-hearing analyses for judges. I am committed to ensuring published materials are well-written and properly supported. I drafted a published order with only one minimal revision. I proactively draft memoranda on issues in preparation for decisions and on those that might arise upon appeal. I am consistently requested to review other clerk draft materials. I successfully managed assignments from three separate judges within the first four months in my position, and I developed and maintained a new docket tracking system.

Supporting documents are included with the application. Recommendations will be submitted by Judge Michael Young, Judge Margaret Miller, and Judge Judith Bartnoff. I welcome the opportunity to interview with you. Thank you in advance for your time and consideration.

Respectfully,

Christopher A. Jannace

CHRISTOPHER A. JANNACE

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EDUCATION

American University Washington College of Law Washington, D.C.
Juris Doctor, Cum Laude May 2021
GPA: 3.68 (top 20%)
Journal: Business Law Review
Honors: AU WCL Certificate of Excellence for Legal Rhetoric Citation, Research, & Writing;
 Highest grade – Communication Law & Information Policy, Cybersecurity Law
Activities: Alternative Dispute Resolution Honor Society; Dean's Fellow, Legal Rhetoric Dept; Int'l
 Trade & Investment Law Society (Executive Board); Tech Law & Security; Duke Law,
 Ethics & National Security Conference (2020–22); BARBRI Ambassador

United States Military Academy West Point, NY
Bachelor of Science, Economics May 2005

EXPERIENCE

Federal Mine Safety and Health Review Commission Washington, D.C.
Attorney Advisor; The Honorable Judge Michael G. Young, ALJ August 2021 – Current
 Drafted decisions regarding Mine Act violations. Drafted settlement documents and research
 memoranda on Mine Act, Administrative Procedure Act, Constitutional Jurisdiction, and Equal
 Employment Opportunity topics for three judges. Managed judges' dockets, implemented a
 novel docket tracking system, and ensured party compliance with docket requirements.

Federal Energy Regulatory Commission Washington, D.C.
Legal Intern; Office of the General Counsel (Energy Markets) May 2020 – July 2020
 Drafted NOPR regarding agency regulations. Drafted public comment responses. Drafted
 memoranda on Energy law and Administrative Procedure Act requirements.

United States Department of Justice Washington, D.C.
Legal Intern; Aviation, Space & Admiralty Litigation Section May 2019 – July 2019
 Drafted subpoenas and motions to dismiss in support of active cases. Analyzed aviation and
 maritime tort liability cases. Researched loss of use and environmental admiralty issues.

Trafficware Sugar Land, TX
Business Development Manager, Product Manager, Detection Specialist December 2014 – June 2018
 Maintained eight-state territory and grew sales by 500% (exceeded annual quotas). Managed
 sales and technical development of ten employees as a product manager. Presented as a technical
 subject matter expert at multiple traffic engineering conferences.

United States Army Multiple Locations, US and Worldwide
[Captain] Special Forces Officer, Infantry Officer May 2005 – December 2014
 Commanded and supervised operations and training of Afghan and South American security
 forces. Led platoons on over 100 unilateral and Iraqi partner combat patrols. Coordinated
 battalion operational and support activities. Developed novel operational tempo scheme.

ADDITIONAL INFORMATION

Bar Membership: District of Columbia
CLEARABLE: Previously held security clearance
Relevant Skill: Decision writing; Research; Administrative, Employment, and Consumer Protection law
Language: Proficient in professional / conversational Spanish
Personal: Skydiving (B-License, Free Fall & Static Line Jumpmaster), fitness activities, piano, dogs

LAST	FIRST	M	AUID	BIRTH	SEX
JANNACE	CHRISTOPHER	A	4817488	08/05	M
DATE PRINTED					PAGE
06/21/21					1 OF 1

Washington College of Law
ACADEMIC RECORD

AMERICAN UNIVERSITY
W A S H I N G T O N, D C

Course Number	Course Title	Hr	Crs Val	Grd	Quality Points
FALL 2018					
DEGREE OBJECTIVE: JURIS DOCTOR					
LAW-500-001	LEGAL METHODS	01.00	P	00.00	
LAW-501-001	CIVIL PROCEDURE	04.00	A-	14.80	
LAW-504-001	CONTRACTS	04.00	A-	14.80	
LAW-516-014	RESEARCH & WRITING I	02.00	A-	07.40	
LAW-522-001B	TORTS	04.00	A-	14.80	
LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 51.80QP 3.70GPA					
FALL 2020					
LAW-795TS-001	TECH, LAW & SECURITY	02.00	A	08.00	
LAW-805-001	LAW OF INFORMATION PRIVACY	03.00	B+	09.90	
LAW-840-001	SECURED TRANSACTIONS	03.00	B+	09.90	
LAW-856-001	CORPORATE FINANCE	03.00	A	12.00	
LAW-918F-001	BUSINESS LAW REVIEW II	01.00	P	00.00	
LAW SEM SUM: 12.00HRS ATT 12.00HRS ERND 39.80QP 3.61GPA					
SPRING 2019					
LAW-503-001	CONSTITUTIONAL LAW	04.00	B+	13.20	
LAW-507-001	CRIMINAL LAW	03.00	A-	11.10	
LAW-517-014	RESEARCH & WRITING II	02.00	A	08.00	
LAW-518-001	PROPERTY	04.00	A-	14.80	
LAW-652-002	PUBLIC LAW	02.00	A-	07.40	
LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 54.50QP 3.63GPA					
SUMMER 2019					
LAW-769-003	EXTERNSHIP SEMINAR	02.00	A	08.00	
LAW-899-003	SUPERVISED EXTERNSHIP SEMINAR	04.00	P	00.00	
LAW SEM SUM: 6.00HRS ATT 6.00HRS ERND 8.00QP 4.00GPA					
FALL 2019					
LAW-508-003	CRIMINAL PROCEDURE I	03.00	A-	11.10	
LAW-611-001	BUSINESS ASSOCIATIONS	04.00	B+	13.20	
LAW-657-001	INTERNATIONAL TRADE LAW I	03.00	A-	11.10	
LAW-667-001	CYBERLAW	02.00	A-	07.40	
LAW-917A-001	BUSINESS LAW REVIEW I	01.00	P	00.00	
LAW SEM SUM: 13.00HRS ATT 13.00HRS ERND 42.80QP 3.56GPA					
SPRING 2020					
GRADING POLICY CHANGE: ALL COURSES (WITH LIMITED EXCEPTIONS) CHANGED TO MANDATORY PASS/FAIL DUE TO COVID-19 INTERRUPTION					
LAW-550-005	LEGAL ETHICS	02.00	P	00.00	
LAW-633-001	EVIDENCE	04.00	P	00.00	
LAW-695-003	CIVIL TRIAL ADVOCACY	03.00	P	00.00	
LAW-795NT-001	NATL SECURITY & CYBERLAW	02.00	P	00.00	
LAW-917-001	BUSINESS LAW REVIEW I	01.00	P	00.00	
LAW-998-001	A.D.R. COMPETITION	02.00	P	00.00	
LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 0.00QP 0.00GPA					
SUMMER 2020					
LAW-697-E001	WILLS TRUSTS ESTATES	04.00	A-	14.80	
LAW SEM SUM: 4.00HRS ATT 4.00HRS ERND 14.80QP 3.70GPA					
<p>JURIS DOCTOR DEGREE AWARDED: DEGREE DATE: 05/23/21 HONORS: CUM LAUDE JD CUM SUM: 91.00HRS ATT 91.00HRS ERND 246.80QP 3.68GPA</p> <p>END OF TRANSCRIPT</p>					


Hilary T. Lappin
Registrar

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

Office of the Law School Registrar
4300 Nebraska Ave., NW, Suite C107
Washington, DC 20016-2132

BACHELOR OF LAWS/JURIS DOCTOR	
The Degree of Bachelor of Laws was re-designated the Juris Doctor degree by the Board of Trustees of The American University on October 15, 1968. The J.D. degree is conferred nunc pro tunc as of the date of the student's actual graduation from the Washington College of Law.	
GRADES (Calculated in grade point average)	
Effective Fall 1968 through Summer Session 1975 the Law School used the following 3.00 grading system:	
A=3;	B+=2.5; B=2; C+=1.5; C=1; D=0.5; F=0.
Effective Fall 1975 the Law School converted to a 4.00 grading system:	
A=4;	B+=3.5; B=3; C+=2.5; C=2; D=1; F=0.
Effective Fall 1977 the Law School used the following 4.00 grading system:	
A=4;	A+=3.7; B=3; B+=3.3; B=2.7; C+=2.3; C=2; D=1; F=0.
Effective Fall 2019 the Law School used the following 4.00 grading system:	
A=4;	A+=3.7; B=3; B+=3.3; B=2.7; C+=2.3; C=2; D=1; F=0.
GRADES (Not calculated in grade point average)	
IP	In Progress
L	Audit
--	Grade not yet recorded
P	Academic Pass in Pass/Fail Course
FZ	Academic Fail in Pass/Fail Course
W	Withdraw
ACCREDITATION	
American University Washington College of Law is fully accredited by the American Bar Association (ABA) and by the Middle States Association of Colleges and Schools (MSA).	

TRANSCRIPT OF ACADEMIC RECORD

Patent #5,636,874

UNITED STATES MILITARY ACADEMY

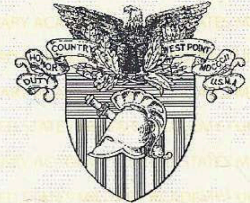
West Point, New York 10996

ACADEMIC RECORD OF: CHRISTOPHER ANTHONY JANNACE

DATE: 18 JAN 13

CLASS OF: 2005

ENTERED: 02 JUL 01



COURSE NUMBER	COURSE TITLE	CREDIT HOURS	LETTER GRADE	COURSE NUMBER	COURSE TITLE	CREDIT HOURS	LETTER GRADE
SUMMER TERM 2001-2002				EV365	CULTURAL & POLITICAL GEOG	3.00	B
MD100	CADET BASIC TRAINING	0.00	P	MD301	2ND CLASS MILITARY DEV I	0.00	P
QPA	CUR 0.00 CUM 0.00			MS301	SMALL UNIT LEADERSHIP	0.50	A-
1ST TERM 2001-2002				PE311	FITNESS LEADER II	1.50	A-
CH101	GENERAL CHEMISTRY I	3.00	B+	SS368	ECONOMETRICS I	3.00	B+
EN101	COMPOSITION	3.00	B-	SS382	MICROECONOMICS	3.00	B
HI107	HISTORY OF THE WORLD	3.00	B	QPA	CUR 3.08 CUM 3.13		
MA103	DISCRETE DYN SYS/INTRO CALC	4.00	B	2ND TERM 2003-2004 DEAN'S LIST			
MD101	4TH CLASS MILITARY DEV I	0.00	P	EV350	ENVIRONMENTAL TECHNOLOGIES	3.00	B
PE113	SURVIVAL SWIMMING - ADVANCED	0.50	A-	IT305	THEORY & PRAC OF MIL IT SYS	3.00	B+
PE117	MILITARY MOVEMENT - GYMNASICS	0.50	B-	MD302	2ND CLASS MILITARY DEV II	0.00	P
PL100	GENERAL PSYCHOLOGY	3.00	B-	MS303	COMBINED ARMS WARFARE	0.50	B+
QPA	CUR 2.95 CUM 2.95			PL300	MILITARY LEADERSHIP	3.00	B+
2ND TERM 2001-2002 DEAN'S LIST				SS307	INTERNATIONAL RELATIONS	3.50	B
CH102	GENERAL CHEMISTRY II	3.00	B	SS388	MACROECON THEORY & PRACTICE	3.00	B
CS105	INTRODUCTION TO COMPUTING	3.00	A	SS394	FINANCIAL ACCOUNTING	3.00	B
EN102	LITERATURE	3.00	B+	QPA	CUR 3.11 CUM 3.13		
HI108	HISTORY OF THE WORLD	3.00	B	SUMMER TERM 2004-2005			
MA104	CALCULUS I	4.50	B	MD400	SMALL UNIT TNG CADRE & CTLT	0.00	A-
MD102	4TH CLASS MILITARY DEV II	0.00	P	QPA	CUR 0.00 CUM 3.13		
MS102	MAP READING-TRP LEADNG PROC	1.50	B+	1ST TERM 2004-2005			
PE116	COMBATIVES II - BOXING MEN	0.50	B	EV450	ENVIRONMENTAL DECISION MAKING	3.00	B-
QPA	CUR 3.24 CUM 3.10			HI301	HISTORY OF THE MILITARY ART	3.00	B-
SUMMER TERM 2002-2003				LW403	CONSTITUTIONAL/MILITARY LAW	3.50	B-
MD200	CADET FIELD TRAINING	0.00	P	MD401	1ST CLASS MILITARY DEV I	0.00	B-
QPA	CUR 0.00 CUM 3.10			MS401	TRNSTN TO THE OFCR CORPS	0.50	B-
1ST TERM 2002-2003 DEAN'S LIST				SS385	COMPARATIVE ECONOMIC SYSTEMS	3.00	B+
LS203	SPANISH I (STANDARD)	3.50	A-	SS470	MONEY AND BANKING	3.00	B
MA205	CALCULUS II	4.50	B-	SS492	DIST PROF DEF ECON SEMINAR	3.00	B
MD201	3RD CLASS MILITARY DEV I	0.00	P	QPA	CUR 2.88 CUM 3.09		
PE212	COMBATIVES IV	0.50	B+	2ND TERM 2004-2005			
PH203	PHYSICS I	3.50	B	HI302	HISTORY OF THE MILITARY ART	3.00	B
PY201	PHILOSOPHY	3.00	C+	LW481	INTERNATIONAL LAW	3.00	B-
SS201	ECONOMICS-PRINCPLS/PROBLMS	3.50	B+	LW488	BUSINESS LAW	3.00	B
QPA	CUR 3.01 CUM 3.07			MD402	1ST CLASS MILITARY DEV II	0.00	A+
2ND TERM 2002-2003 DEAN'S LIST				MS403	TRANSITION TO THE ARMY	0.50	B
EV203	PHYSICAL GEOGRAPHY	3.00	B	PE442	STRENGTH DEVELOPMENT	0.50	A-
LS204	SPANISH II (STANDARD)	3.50	A-	SS484	INTERNATIONAL ECONOMICS	3.00	B
MA206	PROBABILITY & STATISTICS	3.00	A	SS494	PRINCIPLES OF FINANCE	3.00	B-
MD202	3RD CLASS MILITARY DEV II	0.00	P	QPA	CUR 2.90 CUM 3.07		
MS202	PERSPECTIVES ON OFFICERSHIP	1.50	B	GRADUATED 28 MAY 05 WITH BACHELOR OF SCIENCE DEGREE ECONOMICS MAJOR			
PE210	WELLNESS - MFT	1.50	A-				
PH204	PHYSICS II	3.50	B-				
SS202	AMERICAN POLITICS	3.50	B+				
QPA	CUR 3.33 CUM 3.14						
SUMMER TERM 2003-2004							
MD300	CBT/CFT CADRE & DCLT-2ND CL	0.00	P				
QPA	CUR 0.00 CUM 3.14						
1ST TERM 2003-2004 DEAN'S LIST							
EN302	ADVANCED COMPOSITION	3.00	B-				
EV300	ENVIRONMENTAL SCIENCE	3.00	B				

JAN 18 2013

REGISTRAR

Transcript is valid only if academy seal and signature of the registrar are affixed. This student has authorized the release of this information to you. Further release to a third party is prohibited by law without the student's written consent.



FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, COLORADO 80202-2500

April 11, 2022

Administrative Office of the U.S. Courts
OSCAR Program Office

I am writing to recommend Christopher Jannace for a position as an attorney/clerk. Chris worked in our office of the Federal Mine Safety and Health Review Commission, as a law clerk and attorney advisor beginning in August, 2021. I cannot overstate what an incredible job he has done while working here.

We are all hearing judges, who travel around the country to hold full evidentiary trials related to the matters of Mine Safety and Health, including discrimination and whistle blower matters. We also act as judges for other federal agencies, including the ATF, the Justice Department and the Department of Transportation. Normally, a clerk is assigned to one judge during the 2-3 years that they work with us. Chris, however, volunteered to take on extra work and work for two judges. Although he was assigned to Judge Michael Young permanently, he worked for me for several months while my law clerk was on family leave. For several months, then, Chris learned how two judges work, the differences and the needs. In addition, he not only learned Mine Safety and Health technical issues, but successfully completed assignments for discrimination/whistle blower cases and cases outside of Mine Safety and Health. He had varied assignments and instructions from each judge. Chris was hired while our office was primarily working from home. So in addition to the regular challenges of being a new clerk, he was faced with the myriad of challenges raised by COVID-19 in his first year of work.

Chris has worked on a number of projects, some routine and some not so routine. He has independently and ably, drafted orders for settlements, based upon the documents filed by the parties. He has drafted orders, reviewed motions, written a number of memoranda and analysis of issues, and drafted final decisions after hearing. In each instance, his work was far beyond what we expect of a first year law clerk. He researched and drafted a memorandum concerning discovery issues and motions that raised issues of first impression. He also researched and analyzed employment discrimination in the context of a hostile work environment and the retaliatory actions by employers. In each of these memorandums, orders and decisions, Chris's research was thorough and exact. His writing was excellent; it was clear and concise and focused on the issues at hand. He asked questions that were relevant and stopped to review the assignment before going off on an unrelated subject. He completed every assignment well beyond the due date that had been set.

Chris is organized and disciplined. He completed tasks immediately without being asked and understood how to prioritize his work. He was in charge of a number of zoom hearings for the judges, and never failed to lose a witness or hit a snag. His attentiveness helped me move through a large caseload, with less effort, and ascertain that claimants were heard timely.

Chris is an excellent writer, who quickly grasps the issues and concepts and completes the research on point. His legal skills are to be commended, but in addition, he is friendly and helpful. He has the skill to work well with others, including difficult attorneys, in a stressful, busy office. He always shows up and has a good work ethic that serves him well.

I am happy to discuss Chris's work with our office at any time. Please feel free to call me at 303-844-1616.

Sincerely,

A handwritten signature in black ink, reading "Margaret Miller". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Margaret A. Miller
Administrative Law Judge

May 14, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

It is my great pleasure to recommend Christopher Jannace to you as a law clerk. Chris was a student in my Appellate Advocacy class at American University Washington College of Law in the 2021 spring term. I began teaching the course after I retired as an Associate Judge of the Superior Court of the District of Columbia and took senior status in late 2019, and I now have taught the course four times. Chris stands out among the many bright and talented students in my classes.

In addition to review of case law to cover basic principles of appellate jurisdiction and procedure, as well as reading and discussing a variety of articles about brief writing and oral advocacy, my course focuses on a different pending Supreme Court case each term. The students read and discuss the briefs filed by the parties in the Supreme Court, write a bench memo, and then select a side and write their own briefs. They also present oral argument to the class and sit with me as judges for one of the oral arguments by their classmates. I invite practitioners and judges to visit the class and talk about their experience, as well as to give advice about effective appellate advocacy. Although the subject of the course is appellate courts, I also attempt to provide some context for the cases we study from the perspective of a trial judge, so that the students gain some understanding of how cases come to appellate courts.

Chris Jannace contributed greatly to all aspects of the class. He certainly did the required reading, but he also thought about it and always had interesting comments and insights. He asked perceptive questions of our visitors, which added immeasurably to the entire class's experience. He did an excellent job on his bench memo and his brief, and his oral argument also was very good. He was clear and confident (but not cocky), he answered questions directly, and he knew the case and was able to present his arguments effectively. He was the first student to present an argument, which was not easy, and he set the standard for everyone else. He also did a nice job as a judge-- he asked good questions in a respectful and serious way.

Based on my experience, Chris is a good writer and a critical thinker. He also knows what he doesn't know, and he asks good questions. My sense is that he works well independently but also is very collegial. I think he would be an excellent law clerk who would do good work also would work well with other clerks and staff. He also has good judgment and would represent you well.

Please do not hesitate to call me at 202-258-1253 if you have any questions or would like to discuss Chris's candidacy further.

Very truly yours,

Judge Judith Bartnoff

Judith Bartnoff - jbartnoff@american.edu

May 14, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am pleased to enthusiastically recommend Christopher Jannace as a judicial clerk. I have found his intelligence, work ethic, efficiency, and adaptability to be indispensable to my duties as an administrative law judge.

I hired Chris as my clerk in September 2021. He was my first choice, and I was grateful that he accepted the position. While there were candidates who had more impressive academic records, Chris displayed a surprising interest in, and facility with, administrative law concepts during his interview. I had high expectations for him based on that interview and my experience working with people who have a similar background. He has exceeded them.

Because I was a new judge, I had a relatively undeveloped docket when Chris joined my office. Most of the initial work involved settlement of cases in the early stages. Chris quickly progressed from responding to settlement assignments to anticipating them. On his own initiative, he developed a new docket tracking system that is easier to use and allows me to instantly see the status of every case. He updates the docket tracker daily, making sure that we keep cases on track for resolution and each of the steps on the way to that objective.

In processing settlement agreements, Chris very quickly internalized my views and preferences. As a result, final orders for settlement agreements are produced almost instantaneously. I rely on him to manage contacts with the parties and to resolve concerns I have with proposed settlements. His tact, thorough attention to detail, and ability to organize and prioritize assignments have been key to our success.

The Mine Safety and Health Act of 1977 (the "Mine Act") requires the Commission (usually through its ALJ's) to approve all settlements. Chris' research skills have been essential as I work to ensure that settlements are appropriate under the Commission's standards. This has been important as we have challenged the applicability of two Commission precedents to certain settlement agreements. Chris' thorough research and ready grasp of the administrative law and statutory construction principles at issue bolstered my confidence in pursuing interlocutory review of these groundbreaking issues before the Commission.

Drafting decisions after a hearing is probably the most challenging task faced by Commission law clerks. It typically takes a new clerk some time to master this skill. Chris managed my first hearing in 2021, including the planning and oversight of prehearing preparations. He orchestrated all of this flawlessly. Granted, this was not a complicated case, but his reliability and attention to detail ensured that the remote hearing avoided any difficulties.

When the time came to draft the decision, I told Chris I wanted to radically depart from the most common formats. I am a new judge, but I was a commissioner for more than 16 years, and reviewing ALJ decisions was my primary responsibility. I told Chris that I wanted a decision that would be readily digested on review by the Commission, and by miners (the Mine Act requires our decisions to be posted in the mine where the alleged violations were cited). As a test, I gave Chris only general guidelines, even though I knew what I was looking for.

Chris produced a first draft earlier than he had promised. It was better than many published decisions I have read, but I was not satisfied. Again, I decided to test Chris by providing only general guidance, instead of editing the decision. The second draft was almost exactly what I was looking for. My only revisions were adjustments to the penalty and negligence aspects because of inherently judicial decisions I had decided to make but had not communicated to him.

I also learned from this exercise that Chris has a comprehensive grasp of the Blue Book. This has been helpful to me and to others, as he has voluntarily reviewed other judges' decisions. Additionally, Chris volunteered to serve as a temporary law clerk for our most productive judge while her clerk was on extended family leave. This judge had said she did not want a first-year clerk, but we have a good relationship and she agreed to trust me. She was quite impressed with Chris' performance and her reliance on him grew through the assignment.

Similarly, Chris also volunteered to help our chief administrative law judge eliminate a backlog of orders. I would note that during these assignments, I noticed no drop-off in Chris' management of my assignments, and his experiences have expanded his perspective and enhanced his skills.

While subsequent employers might be concerned that Chris will have limited exposure to broader substantive law concepts, you should not be. The Mine Act is not complicated, exactly, but it is unusual. Chris has rapidly assimilated a thorough understanding of the Mine Act's principles, including some that are somewhat unstable. To decide cases properly, I need to

Michael Young - myoung@fmshrc.gov - 202-577-6825

anticipate how my decisions may be decided on review – not only by the Commission, but by the circuit courts of appeal.

Chris' assistance with this has been invaluable. He has produced numerous thorough, thoughtful memoranda on the Mine Act, Administrative Law, and statutory and regulatory concepts at issue. His ability to master these concepts has given me the confidence to volunteer to hear cases for other agencies as well. I have presided over a settlement for the Alcohol and Tobacco Tax and Trade Bureau, and currently have matters pending before the Equal Employment Opportunity Commission and the Consumer Product Safety Commission, and we are awaiting assignment of cases from the Patent and Trademark Office. Chris is therefore likely to have a much broader substantive legal experience than you might expect from an attorney working in a narrow, limited-jurisdiction agency.

I would be remiss if I did not also note Chris' sensitivity and tact in recognizing and navigating a delicate situation when he joined my office. I had been assigned a temporary clerk whose judge had died in office. This was understandably difficult for her, and she was disappointed that I did not select her as my full-time clerk. Chris adroitly worked through the potential challenges and has been an exemplary teammate through the transition. I have been surprised and pleased at how well they worked together, and how he has helped a fellow attorney rebound from an unfortunate situation.

I could continue to cite examples, but I will sum up my endorsement by noting that I could probably get approval for Chris to extend his clerkship with me for another year. I have discouraged him from doing so. His departure will be a great loss to me, but he has much more to offer, and a clerkship for an Article III judge would provide him a much better opportunity to fully develop his potential. I have no idea what his ceiling is, but I will assure you that you could not find anyone who will outwork him, or who will more conscientiously attend to your responsibilities as a judge.

Thank you for considering Chris for a clerkship. Please feel free to contact me if you have any further questions (my mobile number is (202)577-6825).

Respectfully,

Michael G. Young
Administrative Law Judge
Federal Mine Safety and Health Review Commission

Michael Young - myoung@fmshrc.gov - 202-577-6825

CHRISTOPHER A. JANNACE

2840 Broad Wing Dr., Odenton, MD 21113 • (626) 261-0875 • chrisjannace@gmail.com

WRITING SAMPLE

The attached writing sample is an Order prepared for, and subsequently issued by, the Honorable Michael G. Young, an administrative law judge at the Federal Mine Safety and Health Review Commission, and my supervisor. It addresses violations of the Federal Mine Safety and Health Act of 1977 and specific designations of those violations that affect assessed penalties. It also includes a brief discussion of regulatory interpretation.

Judge Young provided minimal editing to the document. Specifically, he amplified the efforts of the assistant mine manager for the negligence evaluation in Section IV(B)(4). He also made small changes to the penalty sections [factor emphasis and amount] in Sections III(B)(5) and IV(B)(5), which is an inherently judicial function.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

February 16, 2022

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

CONSOL PENNSYLVANIA COAL
COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2021-0074
A.C. No. 36-07416-532307

Mine: Enlow Fork Mine

DECISION AND ORDER

Appearances: Ryan Kooi, Esq., Office of the Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the Petitioner

Patrick W. Dennison, Esq., Fisher & Phillips LLP, Pittsburgh,
Pennsylvania, for the Respondent

Before: Judge Young

SUMMARY

Citation No. 9203910, 30 C.F.R. § 75.904: Failure to properly identify a high-voltage (995-volt) circuit breaker. Two continuous miner machines were plugged into adjacent circuit breakers, each marked with the same number.

Facts		p. 4 (Slip Op.)
Fact of violation	Affirmed	p. 5
S&S	Affirmed	p. 6
Negligence	Moderate	p. 10
Penalty	\$700	p. 10

Citation No. 9204098, 30 C.F.R. § 75.370(a)(1): Failure to maintain bleeders safe for travel due to standing water, violating the approved Ventilation Plan. Deep water was allowed to accumulate in travelway used to examine the bleeders.

Facts		p. 11
Fact of violation	Affirmed	p. 13
S&S	Affirmed	p. 14
Negligence	None	p. 16
Penalty	\$150	p. 17

I. INTRODUCTION

This case is before me upon petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“Mine Act” or “Act”), 30 U.S.C. § 815(d). At issue are two citations under section 104(a), issued to Respondent, Consol Pennsylvania Coal Company, LLC (“Consol” or “Respondent”).¹ The parties presented testimony and documentary evidence at a video conference hearing on September 28–29, 2021, and filed post-hearing briefs.

Consol owns and operates the Enlow Fork Mine, located in Greene and Washington counties, Pennsylvania. Jt. Stips. 1, 2, 5; S. Post-Hearing Br. at 3 (Jan. 7, 2022) (“S. Br.”). The mine is an underground coal mine and is subject to the jurisdiction of the Mine Act and the Commission. Jt. Stips. 3, 4; S. Br. at 3. Citation No. 9203910 alleged that Respondent failed to properly identify a 995-volt circuit breaker, posing a risk of miners inadvertently removing power from the wrong equipment. Citation No. 9204098 alleged that Respondent failed to comply with its approved Ventilation Plan (“Plan”) by permitting the accumulation of standing water that prevented safe travel. For reasons set forth below, I **AFFIRM** both citations with their assessed gravity, but I **MODIFY** the degree of negligence for Citation No. 9204098 from “moderate” to “none.”

II. STANDARDS

A. Violation

The Secretary must prove the elements of an alleged violation by a preponderance of the evidence. *See Jim Walter Res.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

The requirements of a MSHA-approved ventilation plan are enforceable in the same manner as mandatory safety standards. *See Prairie State Generating Co. v. Sec’y of Lab.*, 792 F.3d 82, 93 (D.C. Cir. 2015) (citing *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976)) (“*Zeigler* recognizes, as do we, both the regulatory character of mine-specific plans, and the Secretary’s paramount control over the responsibility for mine-specific plans, which ‘must also be approved by the Secretary.’”). Mine operators are generally strictly liable for mandatory safety standard violations. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 361 (D.C. Cir. 1997); *Nally & Hamilton Enters., Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011).

B. Gravity

The “likelihood” contemplated within the assessment of gravity is that of the resulting injury. A severity assessment of “lost workdays or restricted duty” is defined as “[a]ny injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty.” 30 C.F.R. § 100.3(e) (2022).

¹ This docket included ten section 104(a) citations. Eight were settled by the parties and approved prior to hearing. *See* Decision Approving Partial Settlement at 3 (Oct. 26, 2021).

Specifically, a gravity evaluation is different from S&S analysis because it assumes the occurrence of the hazard. See *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on “the reasonable likelihood of serious injury,” with gravity inquiry, which focuses on “the effect of the hazard *if it occurs*”) (emphasis added).

C. Significant and Substantial (“S&S”)

A violation is properly designated as S&S if, “based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (citing *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). The four elements required for an S&S finding are expressed as follows:

(1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

An S&S determination must be based on the assumed continuation of normal mining operations. See *Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) (“A determination of ‘significant and substantial’ must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease.”).

D. Negligence

Judges may use a traditional negligence analysis, rather than relying upon Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701–02 (Aug. 2015) (citing *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) (“*JWR*”); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151–52 (7th Cir. 1984)) (“Part 100 regulations apply only to the proposal of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way on Commission proceedings.”). The reasonable prudent person standard should be that of one “familiar with the mining industry, the relevant facts, and the protective purposes of the regulation.” *Id.* at 1702.

E. Penalty

The Commission considers the following factors, from Section 110(i) of the Act, in assessing penalties under the Act:

[T]he operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i) (2006).

III. CITATION NO. 9203910

A. Factual Findings

This citation was issued by Inspector Robert Hutchison on February 17, 2021. Ex. P-1. He assessed the gravity as “reasonably likely,” “lost workdays or restricted duty,” “S&S,” and one person affected. *Id.* He assessed negligence as “moderate.” *Id.* The inspector stated:

The 995 volt circuit breaker servicing the Co. # 25 continuous miner is improperly identified as the Co. # 43 continuous miner. This condition could cause a miner to inadvertently remove power from the wrong machine which would cause lost work day injuries including electrical shock or burns. Both cables are plugged into the power center between the #4 and #3 entries at 36 crosscut of 2 South Left section (MMU#050-0).

Id. Two of the circuit breakers were marked as the #43 continuous miner—one was #43, and the other was actually #25. *See* Tr. Volume I at 59, 131 (Sept. 28, 2021) (“Tr. I”). Mr. Heffelfinger, Consol’s safety inspector, acknowledged that the #25 continuous miner was not identified properly at the top of the breaker. *Id.* at 146. He did state, however, that there was a brass tag affixed to the cable, where it was plugged into the breaker, that properly identified the cable as that of the #25. *Id.*

In his testimony, the inspector acknowledged this tag, but he also stated that it was difficult to find or read because it was a “half-inch thick diameter brass tag that did have mud and debris on it” and was located under the plug instead of on top. *Id.* at 62, 131, 142. Mr. Heffelfinger acknowledged that the breaker marking and cable tag should match. *Id.* at 148.

The #25 had been brought into the mine between three and four days prior to the inspection. *Id.* at 86, 132. The #25 was not in operation, and there was no testimony as to whether it was fully assembled or whether the cable was plugged into the continuous miner itself. *Id.* at 99–100, 133. The #25 breaker was not switched on at the time of inspection. *Id.* at 71. The #43 was in operation. *Id.* at 77. The breakers were located next to one another. *Id.* at 87. Neither machine was within sight of the load center. *Id.* at 65.

The inspector did not observe damage to cables. *Id.* at 90. However, he described the likely need to fix cables damaged in the course of continued normal mining operations by making a splice or reentering the cable—both of which require handling exposed conductors. *Id.* at 65–68. He stated that cables often get damaged by mobile equipment, shuttle cars, or scoops,

when they are over roadways, and that he generally finds damaged cables about once per month. *Id.* at 65, 104. These cables carry 995 volts. *Id.* at 69. While the inspector acknowledged that people have been killed by such voltage, *id.*, he believed the most likely injury would be severe burns or shock. *Id.* at 75.

Mr. Heffelfinger testified that he brought the #25 into the mine a few days prior. *Id.* at 132. He stated that it had not yet been examined. *Id.* at 135, 138. He noted, and the inspector acknowledged, the existence of “lockout, tagout, tryout” procedures, that the cable would be “blocked” before maintenance, and that an exam would be conducted before using the #25. *Id.* at 93–94, 138, 139. Further, he stated that permissibility exams are done in the normal course of mining. *Id.* at 149. Section foremen inspect the load center twice per day. *Id.* at 76, 96.

B. Disposition

1. Violation

The cited standard states, “Circuit breakers shall be marked for identification.” 30 C.F.R. § 75.904 (2022). The Secretary argues that the standard requires *proper* labeling. S. Br. at 12. I find that this is a reasonable interpretation of the regulation.

The Secretary’s interpretation is reasonable where it is “logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function.” *Gen. Elec. Co. v. U.S. Env’t Protection Agency*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). Here, the Secretary has interpreted this regulation “without the aid or constraint” of rulemaking procedures, so he is entitled to deference to the extent that it has the “power to persuade.” *See Knox Creek Coal Corp. v. Sec’y of Lab.*, 811 F.3d 148, 160 (4th Cir. 2016) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). I therefore weigh its thoroughness, validity, and consistency. *See id.*

The Secretary provided credible testimony that a miner intending to deenergize one piece of equipment might deenergize another because another circuit breaker was marked with the correct equipment’s identification. *See* Tr. I at 72. First, this interpretation is consistent with the language because the regulation requires the breakers to be marked *for identification*. Plain meaning dictates that breakers should be identified. The only logical reason for such a requirement is to enable the control of power to the specific equipment that a miner intends to operate or maintain.

Second, this interpretation serves a permissible regulatory function. The Secretary’s reasoning is valid because the regulation is intended to protect miners—in this case, from the danger of electrocution or serious injury.

I find that the Secretary proved the violation by a preponderance of the evidence. There were two breakers marked as #43. One connected to the #43, but the other was for the #25. Therefore, the breaker for the #25 was improperly identified. This is sufficient to establish a violation under the strict liability applied to mandatory safety standards.

2. Gravity

a. Likelihood

The Secretary asserts that the injury is reasonably likely. If the hazard—attempting to repair a cable that had not been properly deenergized—occurred, it is reasonably likely to result in electrocution or serious injury if a miner contacts bare conductors. I have found that a miner may contact bare conductors while repairing cables. I therefore affirm the assessed likelihood.

b. Severity

The Secretary provided credible testimony that contact with uninsulated conductors while repairing an energized cable could result in severe burns or shock, or even death. I find that electric shock or burns could reasonably result in a miner missing at least a full day of work. I affirm the assessed severity.

c. Number of Persons Affected

The inspector assessed that only one miner would be affected by the hazard. I agree that, logically, one miner would be repairing the cable to contact exposed conductors. Further, I find it reasonable that another miner would not contact the cable after finding that the other miner was injured during that activity. I affirm the assessed number of persons affected.

3. S&S

I affirm the S&S designation for the following reasons.

a. Step 1: The Violation has Been Established.

An improperly marked circuit breaker is sufficient to constitute an underlying violation of a mandatory safety standard for the purposes of *Mathies* Step 1. *See supra* Section III.B.1.

b. Step 2: The violation was reasonably likely to result in the discrete safety hazard against which the regulation is directed—a miner deenergizing the wrong equipment.

Mathies Step 2 is a two-step process: (1) determine the specific hazard the standard is aimed at preventing; and (2) determine whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy, Inc.*, 38 FMSHRC at 1868. This finding must be based on “the particular facts surrounding the violation.” *Northshore Mining Co.*, 38 FMSHRC 753, 757 (2016).

Here, the standard requires proper identification of circuit breakers to inform miners which equipment they are powering or deenergizing. Thus, the hazard is the deenergizing of the wrong equipment prior to conducting maintenance on the equipment or cable.

The Secretary provided testimony that two breakers at the power station were labeled as continuous miner #43 (though one was in fact the #25), that cables are often damaged during normal mining operations, and that repair requires handling bare conductors. The Secretary argues that the Commission acknowledges danger even when there are no exposed copper conductors. S. Br. at 14–15; see *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1284–86 (Dec. 1998); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1575 (July 1984).

The Secretary's reliance on these decisions is misplaced because both cases involved exposure to *damaged* cables and different regulatory standards.²

Nonetheless, I find that the violation was reasonably likely to result in a miner deenergizing the wrong equipment, risking electric shock. The inspector described the methods of cable repair requiring contact with bare wires. He credibly stated that cable damage and subsequent repair are common.

The fact that another breaker was labeled #43 is sufficient for me to conclude that a miner might reasonably deenergize the wrong cable before conducting a repair. A miner who finds what he is looking for might stop looking and would fail to notice that there was another breaker marked with the same number. A miner might not look for or see the mismatched tag, especially if it was below the cable and obscured by mud. Therefore, the violation—failure to properly identify a breaker—is reasonably likely to result in the discrete safety hazard against which the regulation is directed—deenergizing the wrong equipment before repair.

Respondent cites two ALJ cases to assert that Step 2 requires actual—not just theoretical—potential of the proffered event. These decisions do not control my decision here. As ALJ decisions, they are non-precedential. Further, neither case involved an S&S evaluation. Both cases instead dealt with imminent danger orders. *Jim Walter Res., Inc.*, 29 FMSHRC 1043, 1043 (Nov. 2007) (ALJ); *Consol of Ky., Inc.*, 30 FMSHRC 1, 1 (Jan. 2008) (ALJ).³ Here, the

² The operator in *U.S. Steel Mining Co.* failed to fully cover a gash in a cable, but the wires inside still had insulation apparently intact. 6 FMSHRC at 1573. The Commission affirmed the judge's S&S finding because the lack of both layers was sufficient to put miners at risk of electric shock. *Id.* at 1575.

The Commission in *Harlan Cumberland Coal Co.* affirmed a judge's S&S finding where a splice was not completely insulated. 20 FMSHRC at 1285, 1286. The Commission rejected the argument that reasonable likelihood of injury could not be established where there were not exposed copper leads. *Id.* at 1286. Both cases are inapposite to my evaluation here. There is no cable damage alleged for me to apply the Commission's finding that danger exists because of the protection degradation and lack of knowledge about the integrity of the internal wire insulation.

³ Imminent danger orders presume that if normal mining continues, there will be a danger of severe injury or death from a known hazard it can be abated. Here, we must determine whether a hazard not yet present may develop, and we presume that it will not be discovered or abated if so. But even if I applied the standard suggested by respondent, the case here is distinguishable.

dangerous condition would be created by deenergizing the wrong equipment before conducting repairs. The #43 miner was operating at the time. If a miner needed to repair the cable on the #43 miner—a fairly common occurrence—it is reasonably foreseeable that he could deenergize the mislabeled #25 instead—creating the contemplated hazard.

Respondent argues that the Secretary failed to demonstrate that the #25 was energized or would be without an examination, or that miners would be exposed to an energized, damaged cable in normal mining operations. Resp’t Post-Hearing Br. at 8 (Jan. 7, 2021) (“Resp’t Br.”). In support, it states: the #25 was brought underground only recently; the #25 breaker was not powered; no cables were damaged; the #43 was identified correctly; and it would have conducted an examination before use. *Id.*

The recent installation may support a modification in negligence, but it does not negate the fact that the #25 is plugged into a breaker marked #43. The proper identification of the #43 adds nothing because the danger is the possibility that a miner wanting to deenergize the #43 will deenergize the #25 because it is improperly marked as #43. That Respondent would conduct an exam first relies on miner precaution, which is irrelevant to an S&S analysis. *See Sec’y of Lab. v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018)

The contentions that the violative breaker was not powered, and that no cables were damaged at the time of inspection, are overcome by the requirement to assume the continuation of normal mining operations. The #25 was already plugged in, and the cables were running to the machine. Therefore, I assume, in normal operations, that the improperly marked #25 would be energized, and that the cables would require eventual repair from common mining operation damage. *See U.S. Steel Mining Co.*, 6 FMSHRC at 1574 (holding that, in the *Mathies* analysis, one “cannot ignore the relevant dynamics of the mining environment or processes”).

The inspector in *Jim Walter Resources, Inc.* improperly assumed a possible roof fall as a potential ignition source. 29 FMSHRC at 1045 (failing to note any indications of imminent roof fall or other roof hazards). This was, therefore, pure conjecture. *Id.* at 1048. Where it is incorrect to assume a roof fall, the standard here is logically aimed at ensuring equipment can be properly deenergized, which is necessary for movement or maintenance of the equipment or cables. I have found the reasonable likelihood of damage to the cables, and the necessity for deenergizing them for repair, to be supported by credible testimony about the conditions and practices in the mine environment.

A withdrawal order was issued in *Consol of Kentucky, Inc.* because of speculation that electrical equipment and cables *could* be left in the area as an ignition source. 30 FMSHRC at 1, 6, 7 (noting no credible evidence that such equipment was left in the area, making ignition, at best, a theoretical possibility). A judge cannot assume the presence of an ignition source that is not established as present or imminent when reviewing an imminent danger order, but may find that conditions arising in the continuance of normal mining operations may result in the emergence of a hazard in the future.

c. Step 3: It is reasonably likely that a failure to deenergize the correct equipment would cause an injury—electrocution.

Mathies Step 3 asks whether the hazard, not the violation itself, is reasonably likely to cause an injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010). In evaluating the likelihood of injury, judges must assume the occurrence of the hazard. See *Newtown Energy, Inc.*, 38 FMSHRC at 2037.

I assume the occurrence of the hazard—a miner conducting repairs on an energized cable because he deenergized the wrong [improperly marked] continuous miner at the breaker. The Secretary provided undisputed testimony that contact with a live cable during repairs could result in electrocution. I therefore find that the hazard is reasonably likely to result in an injury.

Respondent correctly notes that the Commission has held it insufficient that a violation “could” result in an injury. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678 (Dec. 2010) (remanding for more precise discussion of potential injuries). However, I do not find only that an injury *could* occur. I find that one is reasonably likely to occur during normal mining operations because of the improperly identified breaker.

I reject Respondent’s contentions:

a) That the #43 was identified properly. Resp’t Br. at 10. While true, the hazard of injury results from the improper marking of the #25 breaker as #43.

b) That the breakers at issue were next to each other, so that a miner could see both and would deenergize both or look at the cable tag to be safe. *Id.* This all relies on miner precaution—irrelevant to *Mathies* Step 3. *Consolidation Coal*, 895 F.3d at 118.

c) That the #25 was recently brought in and was not energized. Resp’t Br. at 10. The machine would be energized during continued normal mining operations because it was brought into the mine to be used in those operations. See *supra* Section III.B.3.b.

d) That the #25 would have been properly identified prior to use. Resp’t Br. at 11. This again assumes miner precaution.

e) Finally, that there were no issues with any of the equipment. *Id.* I assume the necessity of repairs based on credible inspector testimony and the “relevant dynamics of the mining environment or processes.” See *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

d. Step 4: It is reasonably likely that such an injury would be of a reasonably serious nature—severe burns or shock.

An inspector’s conclusion that a possible injury is of a reasonably serious nature has been held sufficient for *Mathies* Step 4. See *Consol Pa. Coal Co.*, 43 FMSHRC 145, 149 (Aug. 2021) (finding it sufficient that the inspector characterized the potential injury as “serious” and noted potential injuries). The Commission also does not require a specific type of injury for it to be considered serious. See *S&S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013).

Here, the Secretary provided credible, undisputed testimony that that the hazard could result in severe burns or shock, or even death. Respondent only addressed the *likelihood* of

injury, *see* Resp't Br. at 9–11, making no assertions about the severity of the injury if it occurred. I find it is reasonably likely that an injury that could include electrocution would be a reasonably serious injury.

4. Negligence

I find that negligence was properly assessed as “moderate.” The foremen charged with inspecting the load center are familiar with the mining industry and relevant facts. They should have been familiar with the protective purpose of labeling the breaker properly to identify which equipment it powers. Therefore, I find that a reasonable prudent person in their position should have known about the violative condition and acted to remedy it.

Respondent clearly could have known of the condition because it provided no rebuttal to the inspector's contention that the foreman inspects the load center twice per day.⁴ While it is possible that the #25 miner was only brought into the mine within the last inspection cycle, it was plugged into a breaker with the wrong marking, the same as another breaker in that load center, and nobody noticed it during the installation or subsequent examinations. Further, the existence of a small tag on the cable with the correct marking does not negate the obvious violative condition of the more apparent, improper identification on the breaker.

5. Penalty

The Secretary has entered Respondent's violation history [MSHA Directorate of Assessments, Assessed Violation History Report] into evidence. *See* Ex. P-6. I have reviewed Respondent's general and repeat violations, and I find that the Secretary has properly considered Respondent's minimal violation history in his calculation. I agree that the Secretary has properly evaluated the size of the mine in his calculation. The parties have stipulated that payment of the penalty will not affect Respondent's ability to continue in business. *Jt. Stip. 6; S. Br. at 2.*

The proposed penalty was based, in part, on the negligence [moderate] and gravity [reasonably likely] assessed in the citation. While I affirm the negligence and gravity as assessed, I do find that the operator's negligence here was at the low end of the moderate scale due to its proactive adoption of a program, not required by the regulations, to “lock-out, tag-out, try-out” equipment. The inspector acknowledged that he was aware of the program. One cannot rely on this program, and the miner cooperation and precaution upon which it depends, as an absolute protection against injury. But it seems logical that the program would reduce the likelihood of injury in these circumstances, and I find that the operator should be credited for that.

⁴ It is somewhat ironic that the operator asserts that a miner would have noted and avoided the hazard, yet a foreman charged under the Act with the responsibility of identifying hazardous conditions failed to do so in this case. This is not a criticism of the foreman, but an observation on the dangers of confirmation or other biases and the possible effect of time and other pressures and distractions on miners working in a challenging, dynamic underground environment.

The citation was terminated almost immediately by properly marking the breaker as #25, so the operator rapidly complied upon notification. Thus, Respondent demonstrated good faith in achieving rapid compliance following citation. Taking into account both the gravity of the violation—particularly, the S&S finding—and the mitigation of that gravity by the “lock-out, tag-out, try-out” initiative, I assess a penalty of \$700.

C. Conclusion

For the above reasons, I affirm the citation as written and assess a penalty of \$700.

IV. CITATION NO. 9204098

A. Factual Findings

This citation was issued by Inspector Walter Young on February 8, 2021. Ex. P-3. He assessed gravity as “reasonably likely,” “lost workdays or restricted duty,” “S&S,” and one person affected. *Id.* He assessed negligence as “moderate.” *Id.* The description read, in part:

The Mine Operator failed to comply with their approved mine Ventilation Plan . . . in that, the perimeter of the Bleeder system was not maintained safe for travel. Accumulations of dark, orange, murky, standing water were permitted to accumulate . . . at various locations[]. These areas contain tripping hazards in the form of yellow air lines, slick lines, suction hoses, rocks, coal sloughage, crib blocks, rocks and other debris which could not be seen under the surface of the colored water.

Id. Respondent’s Plan was approved by MSHA on February 26, 2020. Ex. P-5, MSHA0065. Section AA is the provision Respondent is alleged to have violated, and reads in part:

The means for maintaining the bleeder safe for travel will include compressed air lines routed underground, used in conjunction with air pumps to remove water as necessary to permit safe travel through the perimeter bleeder system. . . . Standing water shall be pumped and or drained down below the top of elevated walkways to assure for safe passage around the perimeter of the bleeder system.

Ex. P-5, MSHA0067.

In bleeder systems measuring several miles, the inspector was only able to enter approximately 40 feet before having to stop because of “murky,” “dirty dark orange water” that came above his 16-inch boot. Tr. I at 206, 208, 214, 228; Tr. Volume II at 45–46 (Sept. 29, 2021) (“Tr. II”); Ex. P-4, MSHA0018. The inspector took depth measurements of 1.6 and 1.8 feet by reaching as far into the bleeder as he could, noting that he also observed fresh water stains up to three feet high. Tr. I at 208, 211, 217.

The inspector testified that he could not see below the surface of the water in the two inspection areas. *Id.* at 214. Mr. Verbosky, Consol’s safety inspector, acknowledged that he

could not see through the water and would not be able to see obstacles underneath, *see* Tr. II at 52–53, 65, though Mr. Houchins, Consol’s assistant mine foreman, stated that a lot of the water was clear, *id.* at 168.

The inspector said that the bleeders were not maintained to be safe for travel. Tr. I at 170. Tripping hazards associated with the presence of standing water include rip sloughage, rocks, loose crib blocks, suction lines, discharge lines, air lines, slick lines, and generally uneven terrain. *Id.* at 170, 197. Possible injuries include slip and fall injuries, strains, sprains, concussions, contusions, and broken bones. *Id.* at 198, 208. He also noted the possibility of cellulitis from skin or wound contact with contaminated water. *Id.* at 208, 288–91.

While acknowledging that it was possible to drown in an inch of water, *see id.* at 234, the inspector assessed the most likely severity of the injury to be “lost workdays or restricted duty” from a slip and fall injury. He also noted that examiners normally travel in pairs, but that the practice would not prevent one person from tripping. *Id.* at 235.

The standing water had no effect on the ventilation. Tr. II at 23, 141; Ex. R-5. The bleeder is not a place where miners regularly work—it is only traveled by examiners, and nobody was conducting exams at the time of the inspection. *Id.* at 32, 86. Mr. Baker, Consol’s mine examiner, stated that miners, including examiners, are supposed to walk carefully while doing their work. *Id.* at 115. Similarly, Mr. Houchins stated that the presence of standing water makes you walk more carefully. *Id.* at 158, 183.

Multiple bleeders had standing water, at different levels, for six weeks. *See* Tr. I at 188, 190–94; Ex. P-4, MSHA0027, 0030–34. Consol continuously pumped the water and added equipment—pumps, compressors, discharge lines, sumps—as necessary. Tr. II at 35, 63–64, 89, 112, 136, 164. Mr. Verbosky testified that water had been pumped down below the cited levels at dates prior to the inspection. *Id.* at 40. Mr. Baker testified that water had previously been pumped down to ankle depth or lower (calling it a “minimum level”), but that unforeseen circumstances and problems with pumps contributed to the cited standing water. *Id.* at 104, 121; *see also* Tr. I at 265–68; Ex. P-4, MSHA0027–30.

Respondent expended significant effort to remove water. Messrs. Verbosky and Houchins testified about installing multiple compressors on the surface. *Id.* at 63, 136, 161. They each also noted the creation of sumps to move water. *Id.* at 72–73, 136, 137, 176–77. Mr. Tajc, Consol’s ventilation engineer, and Mr. Houchins each described carrying new or repaired pumps several miles to abate the accumulation. *Id.* at 93, 146, 151, 152–53, 154.

Witnesses also described compounding problems. First, the inspector acknowledged that the bleeders in this mine were predominantly very wet, and that there is water in the bleeders all the time that is impossible to remove. *See* Tr. I at 170, 270. There were continuous equipment failures, but Respondent replaced, repaired, and installed additional pumps. *See id.* at 229–31, 255–567; Ex. P-4, MSHA0007–08. Finally, a water pipe broke around the time of the citation, and Mr. Houchins attested to previously changing broken pipes. *See* Tr. II at 114, 146.

B. Disposition

1. Violation

The cited standard requires development of and compliance with an approved ventilation plan. 30 C.F.R. § 75.370(a)(1) (2022). Required contents include the means of maintaining bleeders free of standing water. *See id.* § 75.371(aa) (2014).

The requirements of a MSHA-approved ventilation plan are treated as mandatory safety standards for the purposes of inspection. The cited standard requires the operator to follow the contents of the approved plan. The approved plan required pumping to remove standing water specifically to make travel safe. *See supra* Section IV.A.; Ex. P-5, MSHA0067.

Respondent asserts that there is no violation because it complied with the Plan, stating, “[N]owhere in the mine’s ventilation plan does it state that the mere presence of standing water [of] any depth or color is a violation.” Resp’t Br. at 23. Respondent argues that because the Plan “does not establish any criteria for when a certain depth or color of water constitutes a violation,” it lacked notice of the criteria the inspector used to assess the violation. *Id.* at 27.

The Plan requirements are enforceable as mandatory safety standards. Respondent was not without notice of the applicable standard. First, precedent provides that such a violation and corresponding S&S designation have been affirmed against this operator. *See Consol Pa. Coal Co.*, 39 FMSHRC 1893, 1899 (Oct. 2017) (“Consol does not contest the finding that the accumulations of water violated the ventilation plan’s requirement that bleeders be maintained safe for travel, thus satisfying the first element of the *Mathies* test.”).

Second, per the *Skidmore* standards, I am persuaded that the Secretary’s interpretation of the regulation—that a violation occurs when standing water is at a depth and darkness that obscures possible obstacles—is reasonable. First, this interpretation is consistent with the regulation’s language requiring the removal of standing water to ensure safe travel. *See* Ex. P-5, MSHA0067. Plain language dictates that safe travel is hindered by the presence of standing water. This is due to the presence of obstacles obscured from view.

Second, this interpretation serves a permissible regulatory function. The Secretary’s reasoning is valid because the regulation is intended to protect miners—in this case, from slip and fall hazards.

I find that the Secretary proved the violation by a preponderance of the evidence. Standing water existed in the violative bleeders. The water went above the inspector’s boots even before deeper points in the water. Testimony from the inspector *and* Consol employees demonstrated that the water was “murky” and darkly colored to the point that they could not see obstacles under the water. This is sufficient for a violation under the strict liability for mandatory safety standards.